

D-0378

SUPREME COURT OF TEXAS CASES

009

EDGEWOOD INDEPENDENT SCHOOL DISTRICT V. KIRBY

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SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

V.

WILLIAM N. KIRBY, ET AL.,

Appellees.

REPLY BRIEF OF PLAINTIFFS/APPELLANTS AND
CROSS-APPELLEES EDGEWOOD I.S.D., ET AL.

I.

INTRODUCTION

In June 1987, the District Court (Clark, H.) found the Texas School Finance System unconstitutional. That judgment was unanimously affirmed by this Court. In summer 1990 the District Court (McCown, S.) studied the language of Senate Bill 1 thoroughly, heard the admissions of the State on the structure of the bill as well as Plaintiffs' evidence and extensive arguments of counsel, considered the bill in terms of the history of school finance in Texas and the chronic problems in school finance, and determined that Senate Bill 1 violates art. VII § 1, as interpreted by this Court.

In this process the District Court interpreted Senate Bill 1 as this Court has directed district courts to interpret statutes, i.e. to look at the intention of the Legislature primarily from the language of the statute, and then to consider the history of the subject matter, the end to be attained, the mischief to be remedied, and the purpose to be accomplished. City of Coahoma v. Public Utility Commission of Texas, 626 S.W.2d 488, 490 (Tex. 1981).

II.

SENATE BILL 1 IS UNCONSTITUTIONAL

- A. Senate Bill 1 Allowance of a Separate and Better School Finance System for at Least 5% of Students in the State Violates Article VII, Section 1, this Court's Mandate as well as the Texas Equal Protection Clause.

Senate Bill 1 seeks to define away the problems in the School Finance System noted by this Court in its Edgewood v. Kirby opinion. Specifically, Senate Bill 1 only speaks about the program available to up to 95% of the children in the state and not the at least 5% of children in the state who live in the richest districts. These 5% are a "set of men,... entitled to exclusive separate public enrollments, or privileges," Tex. Const. art. I § 3.

Defendants' major witness admitted at trial that approximately \$470 million a year is wasted in these districts. At their current average tax rate of \$.72, these districts can raise and spend hundreds more millions of dollars than their counterparts in poorer districts at the \$1.18 tax rate (the full implementation tax rate

in Senate Bill 1). If these districts excluded from the system were included in the system, it is undisputed that an additional \$470 million annually would be available for education at the \$1.18 tax rate from these districts. (TR. 2252)

There is also no dispute that the master's plan demonstrates that approximately \$500 million a year (this is in addition to the \$470 million wasted by the wealthy districts) could be moved from richer districts to poorer districts within the present Foundation School Fund Program, without an additional penny of state money. (See Master's Plan filed June 1, 1990) ¹

B. Senate Bill 1 is the Same System as the System Found Unconstitutional by this Court.

Defendants have strongly criticized the District Court for holding that Senate Bill 1 will not create a Constitutional system. This holding by the District Court is based upon the language of Senate Bill 1 itself. Senate Bill 1 is the same as House Bill 72. House Bill 72 has been found by this Supreme Court not to work. House Bill 72 is not a constitutional system and because Senate Bill 1 is the same structure as House Bill 72, it cannot work to create a constitutional system.

That Senate Bill 1 is the same structure as previous school finance bills is plain on the face of the statute, and further

¹ Plaintiffs produced un rebutted evidence that \$1 billion annually could be moved from richer to poorer districts within the Foundation School Program monies. (S.F. 1106)

supported by admissions by the Defendants,² and on unrebutted testimony by Plaintiffs witnesses.

Senate Bill 1 is a school finance system of three tiers. The first tier is the Foundation School Program, the second tier is the Guaranteed Yield Program and the third tier is local enrichment above the state program called unequalized enrichment. The District Court found that this is the same system as existed previously. Mr. Moak, the state's witness, and Mr. O'Hanlon, State's attorney agree that Senate Bill 1 included these three tiers. (S.F. 41, 1621, etc.)

Plaintiffs witnesses Dr. Hooker, Dr. Cardenas and Dr. Cortez testified that in many ways Senate Bill 1 is less equitable than the previous bill. (e.g. S.F. 99, 108, 115, 128 658)

² The following testimony was provided by Mr. Moak, the State's major defense witness.

(Gray) - Question

But as far as ensuring access, you can't tell the Court that this bill ensures that. It may give the opportunity for it, but it doesn't ensure it?

(Moak) - Answer

That's correct.

...

(Gray) - Question

And the first advantage that is listed [referring to Senate Bill 1 compared to other school finance programs] is the least change to the current system. You see that?

(Moak) - Answer

Yes, Sir.

Question

And in fact, Senate Bill 1, to the extent it's a change from the current system, is the least change to the current system of the other options that were presented and explored?

Answer

That's correct. (S.F. 2332-2333)

C. Senate Bill 1 Like Its Predecessor House Bill 72 Has Many Studies, But No Guarantee of Their Application or Fairness.

The Senate Bill 1 studies and the "research base" so touted by Defendants are merely repeats of previous studies and research bases. Below is a comparison of the "new" Senate Bill 1 and the "old" law.'

<u>Senate Bill 1</u>		<u>Previous Law</u>
<u>New</u>	<u>Regarding</u>	<u>Old</u>
16.008(b)(1) 16.256(e)(1) 16.202(a)(2)	Basic Allotment	16.201(1) 16.201(5)
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16.202(a)(5)	Fiscal Neutrality	Gilmer Aiken Study 1948 Connally Commission 1966 Select Committee -- 1984 Select Committee -- 1988 Select Committee -- 1989 Myriad Others 1935-1990

' All citations are to Texas Education Code.

Indeed every two years, the State Board of Education issues a lengthy report which recommends the total cost of the program as well as "numbers" for every component of the program. These studies are required by statute to be specifically forwarded to the same state officials that are involved in the Senate Bill 1 process. Tex. Educ. Code §§ 16.179, 16.203. Further, historically a series of finance study commissions appointed by the governor have applied various statistical tests to the system and reported those matters to the governor, lieutenant governor, speaker of the house, etc. (e.g. Select Committee on Education 1988).

D. There is no Guarantee of State Funding Based on the Recommendations of the Foundation School Fund Budget Committee.

Defendants argue that a difference between the Senate Bill 1 studies and the studies in previous school finance statutes is that under Senate Bill 1 in future years the Foundation School Fund Budget Committee has the duty to suggest costs and forward those numbers to the Legislative Budget Board which will then put those numbers into their recommended budget. (Tex. Educ. Code § 16.256(b)) However, the Foundation School Fund Budget Committee has had that power since 1984. Only the Legislature can appropriate money to pay for the program, and of course the Legislature can change or ignore any of the recommendations of the Foundation School Fund Budget Committee.

The Defendants in their brief, list the recent findings of the Foundation School Fund Budget Committee on the cost of the

Foundation School Program for the 1991-92 and 1992-93 school years. (See Def. State Brief at 38) However, there is absolutely no guarantee that the Legislature will fund the program at that level or use the "key numbers" on which the Foundation School Fund Budget Committee bases their projections.

The Foundation School Fund Budget Committee projections however, have much more weight this year than they will in two years. This year their projections are based on numbers already set in Senate Bill 1 (except for a few additional assumptions). In future years the Foundation School Fund Budget Committee will make its recommendations based on its own interpretation of studies produced by experts. In fact, the Foundation School Fund Budget Committee will have almost unrestrained discretion to recommend whatever numbers it wants. Senate Bill 1 specifically allows the Foundation School Fund Budget Committee to change all of the major parts of the School Finance structure after 1992-93. (See Tex. Educ. Code §§ 16.101, 16.252, 16.256(f), 16.302(a), 16.302(b), 16.303)

Even after this discretion is exercised there is no guarantee that the Legislature will abide by the recommendations of the Foundation School Fund Budget Committee.

Of course, all of this begs the question -- even if the recommendations of the Foundation School Fund Budget Committee are accepted, they still do not produce a constitutional system.

The Court's finding of Senate Bill 1 will not work were based on at least the following factors:

1. That Senate Bill 1 excludes at least 5% of children in the state from the system.

2. Both the counsel for Defendants and the Defendants representative Mr. Moak, agree that there will be exclusions from the revenues to be equalized. (S.F. 1695, 1796-97, 1800) There is simply no evidentiary issue about the fact that Senate Bill 1 clearly requires in some instances and allows in other instances, certain amounts that school districts actually raise and spend to be excluded from the equalized system. (Tex. Educ. Code 16.001(c)(1) and (c)(2), 16.008(b)(4), 16.256(e)(4), 16.302(c), 16.202(a)(b), 16.202(b))

3. It is undisputed that Senate Bill 1 creates no allotments for facilities.

It is undisputed that at the first trial of this case Defendants produced two statistical experts who testified that House Bill 72, the statute found unconstitutional by this court in a unanimous decision, met all of the statistical tests in the area of school finance. (Transcript of 1st trial 1987 pp. 4244, 4255, 4287, [Dr. Verstegan] and pp. 7251-53 [Dr. Ward]) At this trial, the Defendants experts testified that different statisticians would recommend different statistical measures and levels and the experts understood the structure to be that their recommendations could be accepted or ignored by the Foundation School Fund Budget Committee.

III.

THIS COURT HAS JURISDICTION OVER THE CONSTITUTIONALITY OF SENATE BILL 1, THE FAILURE OF THE DISTRICT COURT TO ISSUE AN INJUNCTION, AND OTHER ISSUES

This Court has jurisdiction of this direct appeal under Tex. Const. art. V § 3-b, Tex. Gov. Code § 22.001(c). City of Corpus Christi v. Public Utility Comm., 572 S.W.2d 290 (Tex. 1978); Railroad Comm. v. Sterling Oil & Refining Co., 218 S.W. 2d 415 (Tex. 1949) (Supreme Court may review questions of whether order is supported by substantial evidence on direct appeal); Ity v. Penick, 493 S.W.2d 506 (Tex. 1973) (direct appeal of denial of temporary injunction allowed); Railroad Commission v. Shell Oil Co., 206 S.W.2d 235 (Tex. 1947) (allowance of direct appeal of temporary injunction of Railroad Commission order on grounds order was illegal, unreasonable and discriminatory); State v. Project Principle, 724 S.W.2d 387 (Tex. 1987); Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971); Cousins v. Sovereign Camp, W.O.W., 120 Tex. 107, 35 S.W.2d 696 (Tex. 1931) (finding of fact based on undisputed evidence is "issue of law").

The elements required in a direct appeal to the Supreme Court are that:

(a) a question of the constitutionality of a statute was properly raised in the trial court;

(b) such question was determined by the order of such court granting or denying an interlocutory or permanent injunction; and,

(c) the question is presented to the Supreme Court for decision.

Bryson v. High Plains Underground Water Cons. District, 297 S.W.2d 117 (Tex. 1956). In this case (1) the questions of the constitutionality of both Senate Bill 1 and the constitutional powers of the District Court to enjoin it were properly presented to the trial court, (2) both of those questions were determined by the trial court (that Senate Bill 1 was unconstitutional and that separation of powers, Tex. Const. art. II § 1 and "deference to the legislative and executive departments" (opinion p. 39) weighed against granting injunctive relief), and (3) these questions are presented to the Supreme Court for review (see all briefs filed in this case).

The correctness of this direct appeal is enhanced by the cross-appeal of the State seeking to overturn the District Court's finding of unconstitutionality and injunction.

Although it is true that this Court has refused jurisdiction of direct appeals when the issue of the constitutionality of the state statute it is not implicated, is also true that the Court has specifically accepted jurisdiction of cases with extensive and complex factual records. City of Corpus Christi v. Public Utility Comm., 572 S.W.2d 290 (Tex. 1978); Railroad Comm. v. Sterling Oil & Refining Co., 218 S.W. 2d 415 (Tex. 1949); Halbouty v. Railroad Commission, 357 S.W.2d 364 (Tex. 1962).

In these cases district courts have found state statutes constitutional or unconstitutional and either issued an injunction

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Defendants' major witness admitted at trial that approximately \$470 million a year is wasted in these districts. At their current average tax rate of \$.72, these districts can raise and spend hundreds more millions of dollars than their counterparts in poorer districts at the \$1.18 tax rate (the full implementation tax rate

in Senate Bill 1). If these districts excluded from the system were included in the system, it is undisputed that an additional \$470 million annually would be available for education at the \$1.18 tax rate from these districts. (TR. 2252)

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supported by admissions by the Defendants,² and on unrebutted testimony by Plaintiffs witnesses.

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² The following testimony was provided by Mr. Moak, the State's major defense witness.

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C. Senate Bill 1 Like Its Predecessor House Bill 72 Has Many Studies, But No Guarantee of Their Application or Fairness.

The Senate Bill 1 studies and the "research base" so touted by Defendants are merely repeats of previous studies and research bases. Below is a comparison of the "new" Senate Bill 1 and the "old" law.'

Senate Bill 1

Previous Law

<u>New</u>	<u>Regarding</u>	<u>Old</u>
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Indeed every two years, the State Board of Education issues a lengthy report which recommends the total cost of the program as well as "numbers" for every component of the program. These studies are required by statute to be specifically forwarded to the same state officials that are involved in the Senate Bill 1 process. Tex. Educ. Code §§ 16.179, 16.203. Further, historically a series of finance study commissions appointed by the governor have applied various statistical tests to the system and reported those matters to the governor, lieutenant governor, speaker of the house, etc. (e.g. Select Committee on Education 1988).

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Defendants argue that a difference between the Senate Bill 1 studies and the studies in previous school finance statutes is that under Senate Bill 1 in future years the Foundation School Fund Budget Committee has the duty to suggest costs and forward those numbers to the Legislative Budget Board which will then put those numbers into their recommended budget. (Tex. Educ. Code § 16.256(b)) However, the Foundation School Fund Budget Committee has had that power since 1984. Only the Legislature can appropriate money to pay for the program, and of course the Legislature can change or ignore any of the recommendations of the Foundation School Fund Budget Committee.

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Even after this discretion is exercised there is no guarantee that the Legislature will abide by the recommendations of the Foundation School Fund Budget Committee.

Of course, all of this begs the question -- even if the recommendations of the Foundation School Fund Budget Committee are accepted, they still do not produce a constitutional system.

The Court's finding of Senate Bill 1 will not work were based on at least the following factors:

1. That Senate Bill 1 excludes at least 5% of children in the state from the system.

2. Both the counsel for Defendants and the Defendants representative Mr. Moak, agree that there will be exclusions from the revenues to be equalized. (S.F. 1695, 1796-97, 1800) There is simply no evidentiary issue about the fact that Senate Bill 1 clearly requires in some instances and allows in other instances, certain amounts that school districts actually raise and spend to be excluded from the equalized system. (Tex. Educ. Code 16.001(c)(1) and (c)(2), 16.008(b)(4), 16.256(e)(4), 16.302(c), 16.202(a)(b), 16.202(b))

3. It is undisputed that Senate Bill 1 creates no allotments for facilities.

It is undisputed that at the first trial of this case Defendants produced two statistical experts who testified that House Bill 72, the statute found unconstitutional by this court in a unanimous decision, met all of the statistical tests in the area of school finance. (Transcript of 1st trial 1987 pp. 4244, 4255, 4287, [Dr. Verstegan] and pp. 7251-53 [Dr. Ward]) At this trial, the Defendants experts testified that different statisticians would recommend different statistical measures and levels and the experts understood the structure to be that their recommendations could be accepted or ignored by the Foundation School Fund Budget Committee.

III.

THIS COURT HAS JURISDICTION OVER THE CONSTITUTIONALITY OF SENATE BILL 1, THE FAILURE OF THE DISTRICT COURT TO ISSUE AN INJUNCTION, AND OTHER ISSUES

This Court has jurisdiction of this direct appeal under Tex. Const. art. V § 3-b, Tex. Gov. Code § 22.001(c). City of Corpus Christi v. Public Utility Comm., 572 S.W.2d 290 (Tex. 1978); Railroad Comm. v. Sterling Oil & Refining Co., 218 S.W. 2d 415 (Tex. 1949) (Supreme Court may review questions of whether order is supported by substantial evidence on direct appeal); Ity v. Penick, 493 S.W.2d 506 (Tex. 1973) (direct appeal of denial of temporary injunction allowed); Railroad Commission v. Shell Oil Co., 206 S.W.2d 235 (Tex. 1947) (allowance of direct appeal of temporary injunction of Railroad Commission order on grounds order was illegal, unreasonable and discriminatory); State v. Project Principle, 724 S.W.2d 387 (Tex. 1987); Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971); Cousins v. Sovereign Camp, W.O.W., 120 Tex. 107, 35 S.W.2d 696 (Tex. 1931) (finding of fact based on undisputed evidence is "issue of law").

The elements required in a direct appeal to the Supreme Court are that:

(a) a question of the constitutionality of a statute was properly raised in the trial court;

(b) such question was determined by the order of such court granting or denying an interlocutory or permanent injunction; and,

(c) the question is presented to the Supreme Court for decision.

Bryson v. High Plains Underground Water Cons. District, 297 S.W.2d 117 (Tex. 1956). In this case (1) the questions of the constitutionality of both Senate Bill 1 and the constitutional powers of the District Court to enjoin it were properly presented to the trial court, (2) both of those questions were determined by the trial court (that Senate Bill 1 was unconstitutional and that separation of powers, Tex. Const. art. II § 1 and "deference to the legislative and executive departments" (opinion p. 39) weighed against granting injunctive relief), and (3) these questions are presented to the Supreme Court for review (see all briefs filed in this case).

The correctness of this direct appeal is enhanced by the cross-appeal of the State seeking to overturn the District Court's finding of unconstitutionality and injunction.

Although it is true that this Court has refused jurisdiction of direct appeals when the issue of the constitutionality of the state statute it is not implicated, is also true that the Court has specifically accepted jurisdiction of cases with extensive and complex factual records. City of Corpus Christi v. Public Utility Comm., 572 S.W.2d 290 (Tex. 1978); Railroad Comm. v. Sterling Oil & Refining Co., 218 S.W. 2d 415 (Tex. 1949); Halbouty v. Railroad Commission, 357 S.W.2d 364 (Tex. 1962).

In these cases district courts have found state statutes constitutional or unconstitutional and either issued an injunction

or refused to issue an injunction. However, in each case factual matters were clearly involved, although factual issues were not decided by the Supreme Court.

Defendants have cited to older cases stating that art. V § 3-b appeals are limited only to issues specifically fitting its requirements, even in the same case. State v. Spartans Industries Incorporated, 447 S.W. 2d 407 (Tex. 1969).

However, in more recent direct appeal cases this Court has held:

Where the Supreme Court has appellate jurisdiction of any issue it acquires "extended jurisdiction" of all other questions of law properly preserved and presented.

City of Corpus Christi v. Public Utility Commission, 572 S.W. 2d 290 (Tex. 1978); Harry Eldrich Company v. TS Lankford Anderson Sons Incorporated, 371 S.W. 2d 878 (Tex. 1963).

The City of Corpus Christi case involved a direct appeal of the denial of injunction of an administrative action. *

The Supreme Court held that where the Supreme Court had proper jurisdiction on direct appeal of some points of error, the District Court also had jurisdiction to consider another point of error which would not in itself support the jurisdiction of the Supreme Court on direct appeal. City of Corpus Christi, id. at p. 294. The Supreme Court considered the history of public utility regulation, the reasons for the passage of the act, the public

* The precursor of the present statute allowed direct appeals of the granting or denial of an injunction based on the validity of an administrative order.

utility regulatory act being challenged in that case, and the factual background of that case, for example, City of Corpus Christi, id. at pp. 293-296.

The efforts of Defendant-Intervenors to cast this case as a mandamus case rather than an injunction case are inappropriate. The Constitution specifically allows the Plaintiffs to appeal the failure to grant an injunction. Tex. Const. art. V-3(b). To prevent the Supreme Court from issuing a mandate requiring that an injunction be issued would destroy the power of this provision.

IV.

**THE DISTRICT COURT MADE A LEGAL ERROR
WHEN IT DETERMINED THAT PLAINTIFFS REASONABLE
AND NECESSARY EXPENDITURE OF ATTORNEYS' FEES AND
COST BEFORE THE PASSAGE OF SENATE BILL 1 ARE NOT
COMPENSABLE UNDER THE DECLARATORY JUDGMENT ACT**

Although the Defendants tried to characterize all of Plaintiffs work before the passage of Senate Bill 1 as "lobbying," the District Court did not so characterize it and there is no testimony or exhibits to support that characterization.

Plaintiffs attorney put on exhibits (PX exhs. 40-48) which show that he monitored the legislative process, testified before committees, and prepared information for hearings before the Court to enforce this Court's Injunction. This case has been pending since May 1984, i.e. the same cause number 362,516, 250th District Court, Travis County, Texas has continued. The District Court in 1987 retained jurisdiction, which has been affirmed by the Supreme Court. The District Court had hearings in December 1989 under this cause number, and had two other hearings on Plaintiffs Motion to

Enforce Judgment in May and June 1990 before the passage of Senate Bill 1. The unchallenged testimony is that the attorney for Plaintiffs represented the parties in this case in all of these "proceedings." Plaintiffs attorney continually has represented Plaintiffs in this proceeding.

Although Defendants argue extensively that no reported cases specifically allow attorneys' fees for "lobbying," as a general matter all district courts which consider attorneys' fees provisions do specifically allow attorneys compensation for time and money spent before the filing of a lawsuit. Plaintiffs challenge the legal conclusion of the District Court that no attorneys' fees are payable for time spent before the passage of Senate Bill 1. The District Court should be directed to determine what hours spent before the passage of Senate Bill 1 contributed to the development of the case before the District Court or the monitoring of this Court's Declaratory Judgment mandate in November 1989.

Because the District Court has already found that all hours spent in appearing before the Legislature and in resisting the efforts by the state to delay the mandate of this Court were "reasonable and necessary," Plaintiffs ask for rendition of Judgment for all attorneys' fees requested for all hours (of course the 25% deduction by the District Court because of cumulative hours could still be applied). Alternatively, Plaintiffs ask that this Court remand the issue to the District Court with directions that the Declaratory Judgment Act provision on attorneys' fees does

allow the payment of attorneys' fees to attorneys representing their clients to enforce a declaratory judgment granted and in preparation for trial for a declaratory judgment later received.

V.

CONCLUSION

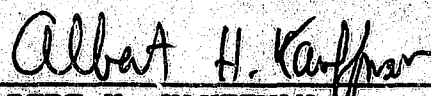
Plaintiffs-Appellants Cross-Appellees pray that their Points of Error be granted, that a mandate as described in their main brief be issued and that Defendants Cross-Points be denied.

DATED: November 21, 1990

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Plaintiffs/Appellants and Cross-Appellees Edgewood I.S.D. was mailed, certified mail return receipt request on this 21st day of November, 1990 to the following attorneys of record:

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FILED
IN SUPREME COURT
OF TEXAS

NO. D-0378

D 0378

DIRECT APPEAL

NOV 21 1990

IN THE SUPREME COURT OF TEXAS

JOHN I. ADAMS, Clerk

By _____ Deputy

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

PLAINTIFF-APPELLANTS,

V.

WILLIAM N. KIRBY, ET AL.,

DEFENDANT-APPELLEES.

Cause No. 362,516
In the 250th Judicial District Court
of Travis County, Texas

REPLY BRIEF OF PLAINTIFF-INTERVENORS

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REPLY POINTS

REPLY POINT NO. 1:

The district court correctly held that Senate Bill 1 violates the Texas Constitution and this Court's mandate.

REPLY POINT NO. 2:

The district court's decision does not raise fact issues that must be resolved by this Court.

REPLY POINT NO. 3:

The standard used by the district court in determining that Senate Bill 1 is unconstitutional and in violation of this Court's mandate properly applied the standards set forth by this Court.

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The district court correctly held that Senate Bill 1 violates the Texas Constitution and this Court's mandate. 1

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IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT,
ET AL.,

PLAINTIFF-APPELLANTS,

V.

WILLIAM N. KIRBY, ET AL.,

DEFENDANT-APPELLEES.

NO. D-0378

REPLY BRIEF OF PLAINTIFF-INTERVENORS

I.

INTRODUCTORY STATEMENT

In their original brief filed November 5, 1990, Plaintiff-Intervenors set forth various reasons why they believe that the trial court correctly found that Senate Bill 1 was unconstitutional under the Texas Constitution, and the standards set forth in the original opinion in this case, Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989). As discussed in that brief, because of the expedited nature of this appeal, Plaintiff-Intervenors filed that initial brief anticipating cross-points of error. This Reply Brief is in response to the briefs filed by the State and Defendant-Intervenors.

II.

ARGUMENT

REPLY POINT NO. 1:

The district court correctly held that Senate Bill 1 violates the Texas Constitution and this Court's mandate.

In their original brief, the Plaintiff-Intervenors set forth their arguments concerning why they believe that the district court correctly held that Senate Bill 1 violates the Texas Constitution and this Court's mandate. Those arguments can be summarized as follows:

1. Senate Bill 1 improperly excluded districts and improperly excluded revenues from its equalization plan, and thus failed to meet this Court's mandate of substantially equal access to education funding;
2. Senate Bill 1's "statistically significant" standard for determination of deviations from substantially equal access is in fact no standard at all; and
3. Senate Bill 1's planning for funding equalization is in fact no more than a plan to make a plan at some time in the future.

Plaintiff-Intervenors will not repeat those arguments in this Reply Brief.

REPLY POINT NO. 2:

The district court's decision does not raise fact issues that must be resolved by this Court.

In their original brief, Plaintiff-Intervenors set forth nine factual conclusions about the effects of Senate Bill 1. It is worth repeating those conclusions here. They are:

- (1) Senate Bill 1 excludes from its consideration the wealthiest districts in which 5% of the public school

students of the state live.

- (2) Senate Bill 1 excludes from its equalization plan any local revenues generated by local tax rate in excess of its targeted equalization rate. During the first year of its operation, this equalization rate is \$.91 per one hundred dollars valuation. In the fifth and final year of the plan, this equalization rate is projected to be \$1.18 per one hundred dollars valuation.
- (3) Senate Bill 1 excludes from the equalization scheme expenditures by local districts for purposes deemed by "senior policy makers" to be in excess of those needed to fund an "adequate" education.
- (4) Senate Bill 1 contains a "test for equalization" that in reality is meaningless. Senate Bill 1 allows for deviations from the equalized funding scheme as long as such deviations are not "statistically significant", yet no definition or context is given the term "statistically significant".
- (5) Senate Bill 1 made no changes to existing school district boundary lines or tax bases.
- (6) The district-by-district disparities noted by this Court in the original Edgewood opinion continue to exist under Senate Bill 1.
- (7) The poor districts' ability to raise funds beyond the equalized level of spending contained in Senate Bill 1 is virtually non-existent.

(8) Although Senate Bill 1 enacts a host of changes to various provisions of state law, it continues the basic scheme for financing education in the state of Texas that existed at the time of the original Edgewood opinion.

(9) Senate Bill 1 does nothing regarding facilities other than to provide for a study of facility needs.

Neither the State nor any of the Defendant-Intervenors seriously contest any of these conclusions. Rather, they simply argue that despite these deficiencies, the statute is constitutional and does comply with the mandate of this Court. Thus, this Court need not resolve factual disputes in order to determine whether these deficiencies support the trial court's judgment. The Court can determine that question as a matter of law.

REPLY POINT NO. 3:

The standard used by the district court in determining that Senate Bill 1 is unconstitutional and in violation of this Court's mandate properly applied the standards set forth by this Court.

The State's cross-point of error number three deals exclusively with the question of the trial court's treatment of local unequalized enrichment. The State makes much of the trial court's omission of the word "local" from its opinion. (See, Brief of State Appellees and Cross-Appellants at 44.) However, in context, it is clear that the defect perceived by the trial court is that the local unequalized enrichment component that remains

available to local districts under Senate Bill 1 is not derived solely from local tax effort. Rather, that component remains tied to the local tax base. Thus, its availability remains tied to the existing disparities in tax bases, the very flaw held to be unconstitutional by this Court in its original opinion. By continuing this system of local enrichment that depends upon local tax bases, the State has clearly failed to follow the mandates of this Court. Thus, the trial court properly applied the standards announced by this Court in holding that Senate Bill 1 is unconstitutional.

CONCLUSION

For all of the reasons set out in their original brief as well as this Reply Brief, Plaintiff-Intervenors urge this Court to affirm the trial court's judgment in all respects.

PRAYER FOR RELIEF

Wherefore, premises considered, Plaintiff-Intervenors pray that the trial court's judgment be affirmed in all respects.


Respectfully submitted,

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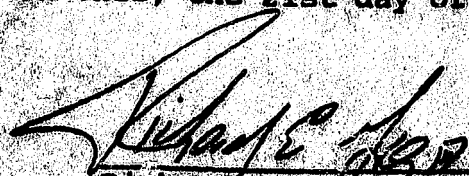
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CERTIFICATE OF SERVICE

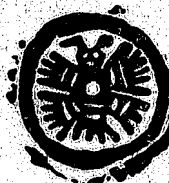
I hereby certify that a true and correct copy of the above and foregoing Reply Brief of Plaintiff-Intervenors, has been sent, via certified mail, return receipt requested, to Ms. Toni Hunter, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, to Mr. Kevin O'Hanlon, at the Texas Education Agency, 1701 North Congress, Austin, Texas 78701, to Mr. Robert E. Luna, at the Law Offices of Earl Luna, P.C., 4411 North Central Expressway, Dallas, Texas 75205, to Mr. Jerry Hoodenpyle, at Rohne, Hoodenpyle, Lobert, & Myers, 1323 W. Pioneer Parkway, Spur 303, P.O. Box 13010, Arlington, Texas 76094-0010, and to Mr. Albert H. Kauffman, at MALDEF, 140 E. Houston Street, Suite 300, San Antonio, Texas 78205, on this, the 21st day of November, 1990.


Richard E. Gray, III

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MALDEF
DIRECT APPEAL

DEC 11 1990

December 5, 1990
JOHN T. ADAMS, Clerk

By _____ Deputy

D 0378

Mr. John Adams, Clerk
Supreme Court Building
Capitol Station
200 West 14th St., Room AG-11
Austin, TX 78711

RE: Edgewood, et al. v. Kirby, et al.
No. D-0378

Dear Mr. Adams:

I would appreciate it if you would forward copies of this brief post hearing letter to the members of the Supreme Court. It is a very brief response to a question asked by Mr. Chief Justice Phillips and it also gives one sentence explanations of two issues not discussed during the hearing on the case.

I. I apologize for not being better able to explain the applicability of Mitchell v. Purolator Security Incorporated, 515 S.W. 2d 101 (Tex. 1974). Although I had read the case I was not sufficiently familiar with its facts and specific holdings to be able to discuss it with the Court.

On rereading the case, I am again assured that it does not defeat jurisdiction in this case under the direct appeal provisions of the Tex. Const. art. V, §3-b. In Mitchell the district court granted a temporary injunction of part of a Texas statute because its provisions did not apply to the plaintiff, a security company. The plaintiff Purolator Security Inc. was threatened with application of a penal statute which would have stopped its agents from carrying firearms and doing their duties as security officers for armored cars carrying monies to federal reserve banks, national banks, etc. The district court held that the two sections of the penal code in question might not apply to officers of the plaintiff security company. The district court went on to say that if the provisions of the penal code were construed to apply to the plaintiff then the provisions might violate the federal and state constitutions. The Supreme Court denied a direct appeal on these bases:

1. That "in the present case relief was sought primarily on the ground that the statute does not apply to appellees operating personnel ... and in the alternative its application would then be unconstitutional."

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December 5, 1990
Page Two

2. "The trial court has made no holding on either question. It only issued a temporary injunction to preserve the status quo until the case could be developed in full."

3. "The temporary relief was not granted or denied on the ground of the statute being constitutional or unconstitutional."

Thus the Mitchell case is distinguishable from Edgewood on at least several grounds:

1. There was not a finding of constitutionality or unconstitutionality in Purolator; there is in Edgewood.

2. The district court in Purolator granted only a temporary injunction to retain the status quo rather than the injunction of the statute on the basis of unconstitutionality, as in Edgewood.

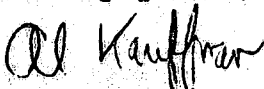
3. The constitutional issues were only secondarily involved in Mitchell because the thrust of the plaintiff's petition and of the district court judgement was to the inapplicability of the statutory provisions rather than the constitutionality of the statutes per se.

II. On a separate issue, although we did not argue the attorneys fees issue we do not waive it. We feel that it is properly before the court under the provision of the City of Corpus Christi v. Public Utility Comm., 572 S.W.2d 290 (Tex. 1978) case which held that where the case in chief is before the Supreme Court on direct appeal it can consider other issues as part of the same appeal.

III. The Andrews ISD Defendant-Intervenors have complained about the sufficiency of the plaintiffs' cost bond. We feel the cost bond is sufficient. However to allay any concerns of the defendants-intervenors we are filing an alternative cost bond which would cure the "difficiencies" which the defendant-intervenors alleged.

Thank you for your consideration of this matter.

Sincerely yours,



ALBERT H. KAUFFMAN
Staff Attorney

AHK:cl

cc: All Counsel of Record

**AMICUS
PETITIONER**

RECEIVED
IN SUPREME COURT
OF TEXAS

D 0378 DIRECT APPEAL

No. D-0378

NOV 21 1990

IN THE SUPREME COURT OF TEXAS

JOHN T. ADAMS, Clerk

By

Deputy

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

PLAINTIFFS,

vs.

WILLIAM N. KIRBY, ET AL.,

DEFENDANTS.

Cause No. 362,516
In the 250th Judicial District Court
of Travis County, Texas

BRIEF OF AMICUS CURIAE
KLEIN INDEPENDENT SCHOOL DISTRICT
IN SUPPORT OF PLAINTIFFS
AND PLAINTIFF-INTERVENORS

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KLEIN INDEPENDENT SCHOOL DISTRICT

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DATE: _____

NAMES OF ALL PARTIES

Plaintiffs:

**EDGEWOOD INDEPENDENT SCHOOL DISTRICT,
SOCORRO INDEPENDENT SCHOOL DISTRICT,
EAGLE PASS INDEPENDENT SCHOOL DISTRICT,
BROWNSVILLE INDEPENDENT SCHOOL DISTRICT,
SAN ELIZARIO INDEPENDENT SCHOOL DISTRICT,
SOUTH SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
LA VEGA INDEPENDENT SCHOOL DISTRICT,
PHARR-SAN-JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT,
KENEDY INDEPENDENT SCHOOL DISTRICT,
MILANO INDEPENDENT SCHOOL DISTRICT,
HARLANDALE INDEPENDENT SCHOOL DISTRICT, and
NORTH FOREST INDEPENDENT SCHOOL DISTRICT**

**on their own behalves, on behalf of the residents of their districts,
and on behalf of other school districts and residents similarly situated;**

**ANICETO ALONZO on his on behalf and as next friend of SANTOS
ALONZO, HERMELINDA ALONZO and JESUS ALONZO;**

**SHIRLEY ANDERSON on her own behalf and as next friend of DERRICK
PRICE;**

**JUANITA ARREDONDO on her own behalf and as next friend of
AUGUSTIN ARREDONDO, JR., NORA ARREDONDO and
SYLVIA ARREDONDO;**

**MARY CANTU on her own behalf and as next friend of JOSE CANTU,
JESUS CANTU and TONATIUH CANTU;**

**JOSEFINA CASTILLO on her own behalf and as next friend of MARIA
CORENO;**

**EVA W. DELGADO on her own behalf and as next friend of OMAR
DELGADO;**

**RAMONA DIAZ on her own behalf and as next friend of MANUEL DIAZ
and NORMA DIAZ;**

**ANITA GANDARA, JOSE GANDARA, JR., on their own behalves and
as next friend of LORRAINE GANDARA and JOSE GANDARA,
III;**

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OPAL MAYO on her own behalf and as next friend of JOHN MAYO, SCOTT MAYO and REBECCA MAYO;

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RUDY C. ORTIZ on his own behalf and as next friend of MICHELLE ORTIZ, ERIC ORTIZ and ELIZABETH ORTIZ;

ESTELA PADILLA and CARLOS PADILLA on their own behalves and as next friend of GABRIEL PADILLA;

ADOLFO PATINO on his own behalf and as next friend of ADOLFO PATINO, JR.;

ANTONIO Y. PINA on his own behalf and as next friend of ANTONIO PINA, JR., ALMA MIA PINA and ANA PINA;

REYMUNDO PEREZ on his own behalf and as next friend of RUBEN PEREZ, REYMUNDO PEREZ, JR., MONICA PEREZ, RAQUEL PEREZ, ROGELIO PEREZ and RICARDO PEREZ;

DEMETRIO RODRIGUEZ on his own behalf and as next friend of PATRICIA RODRIGUEZ and JAMES RODRIGUEZ;

LORENZO G. SOLIS on his own behalf and as next friend of JAVIER SOLIS and CYNTHIA SOLIS;

JOSE A. VILLALON on his own behalf and as next friend of RUBEN VILLALON, RENE VILLALON, MARIA CHRISTINA VILLALON and JAIME VILLALON;

Plaintiff-Intervenors:

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BLANKET INDEPENDENT SCHOOL DISTRICT,
BURLESON INDEPENDENT SCHOOL DISTRICT,
CANUTILLO INDEPENDENT SCHOOL DISTRICT,
CHILTON INDEPENDENT SCHOOL DISTRICT,
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,
COVINGTON INDEPENDENT SCHOOL DISTRICT,
CRAWFORD INDEPENDENT SCHOOL DISTRICT,
CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT,
EARLY INDEPENDENT SCHOOL DISTRICT,
EDCOUCH-ELSA INDEPENDENT SCHOOL DISTRICT,
EVANT INDEPENDENT SCHOOL DISTRICT,
FABENS INDEPENDENT SCHOOL DISTRICT,
FARWELL INDEPENDENT SCHOOL DISTRICT,
GODLEY INDEPENDENT SCHOOL DISTRICT,
GOLDTHWAITE INDEPENDENT SCHOOL DISTRICT,
GRANDVIEW INDEPENDENT SCHOOL DISTRICT,
HICO INDEPENDENT SCHOOL DISTRICT,
JIM HOGG COUNTY INDEPENDENT SCHOOL DISTRICT,
HUTTO INDEPENDENT SCHOOL DISTRICT,
JARRELL INDEPENDENT SCHOOL DISTRICT,
JONESBORO INDEPENDENT SCHOOL DISTRICT,
KARNES CITY INDEPENDENT SCHOOL DISTRICT,
LA FERIA INDEPENDENT SCHOOL DISTRICT,
LA JOYA INDEPENDENT SCHOOL DISTRICT,
LAMPASAS INDEPENDENT SCHOOL DISTRICT,
LASARA INDEPENDENT SCHOOL DISTRICT,
LOCKHART INDEPENDENT SCHOOL DISTRICT,
LOS FRESNOS CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
LYFORD INDEPENDENT SCHOOL DISTRICT,
LYTLE INDEPENDENT SCHOOL DISTRICT,
MART INDEPENDENT SCHOOL DISTRICT,
MERCEDES INDEPENDENT SCHOOL DISTRICT,
MERIDIAN INDEPENDENT SCHOOL DISTRICT,
MISSION INDEPENDENT SCHOOL DISTRICT,
NAVASOTA INDEPENDENT SCHOOL DISTRICT,**

ODEM-EDROY INDEPENDENT SCHOOL DISTRICT,
PALMER INDEPENDENT SCHOOL DISTRICT,
PRINCETON INDEPENDENT SCHOOL DISTRICT,
PROGRESSO INDEPENDENT SCHOOL DISTRICT,
RIO GRANDE CITY INDEPENDENT SCHOOL DISTRICT,
ROMA INDEPENDENT SCHOOL DISTRICT,
ROSEBUD-LOTT INDEPENDENT SCHOOL DISTRICT,
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
SAN SABA INDEPENDENT SCHOOL DISTRICT,
SANTA MARIA INDEPENDENT SCHOOL DISTRICT,
SANTA ROSA INDEPENDENT SCHOOL DISTRICT,
SHALLOWATER INDEPENDENT SCHOOL DISTRICT,
SOUTHSIDE INDEPENDENT SCHOOL DISTRICT,
STAR INDEPENDENT SCHOOL DISTRICT,
STOCKDALE INDEPENDENT SCHOOL DISTRICT,
TRENTON INDEPENDENT SCHOOL DISTRICT,
VENUS INDEPENDENT SCHOOL DISTRICT,
WEATHERFORD INDEPENDENT SCHOOL DISTRICT,
YSLETA INDEPENDENT SCHOOL DISTRICT,
CONNIE DEMARSE,
H.B. HALBERT,
LIBBY LANCASTER,
JUDY ROBINSON,
FRANCES RODRIGUEZ, and ALICE SALAS

Defendants:

WILLIAM N. KIRBY, INTERIM TEXAS COMMISSIONER OF
EDUCATION;
THE TEXAS STATE BOARD OF EDUCATION;
MARK WHITE, GOVERNOR OF THE STATE OF TEXAS,
ROBERT BULLOCK, COMPTROLLER OF THE STATE OF TEXAS,
THE STATE OF TEXAS; and
JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS.

Defendant-Intervenors:

ANDREWS INDEPENDENT SCHOOL DISTRICT,
ARLINGTON INDEPENDENT SCHOOL DISTRICT,
AUSTWELL TIVOLI INDEPENDENT SCHOOL DISTRICT,
BECKVILLE INDEPENDENT SCHOOL DISTRICT,
CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL
DISTRICT,

CARTHAGE INDEPENDENT SCHOOL DISTRICT,
CLEBURNE INDEPENDENT SCHOOL DISTRICT,
COPPELL INDEPENDENT SCHOOL DISTRICT,
CROWLEY INDEPENDENT SCHOOL DISTRICT,
DESOTO INDEPENDENT SCHOOL DISTRICT,
DUNCANVILLE INDEPENDENT SCHOOL DISTRICT,
EAGLE MOUNTAIN-SAGINAW INDEPENDENT SCHOOL DISTRICT,
EANES INDEPENDENT SCHOOL DISTRICT,
EUSTACE INDEPENDENT SCHOOL DISTRICT,
GLASSCOCK INDEPENDENT SCHOOL DISTRICT,
GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT,
GRAPEVINE-COLLEYVILLE INDEPENDENT SCHOOL DISTRICT,
HARDIN JEFFERSON INDEPENDENT SCHOOL DISTRICT,
HAWKINS INDEPENDENT SCHOOL DISTRICT,
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT,
HURST EULESS BEDFORD INDEPENDENT SCHOOL DISTRICT,
IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT,
IRVING INDEPENDENT SCHOOL DISTRICT,
KLONDIKE INDEPENDENT SCHOOL DISTRICT,
LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT,
LANCASTER INDEPENDENT SCHOOL DISTRICT,
LONGVIEW INDEPENDENT SCHOOL DISTRICT,
MANSFIELD INDEPENDENT SCHOOL DISTRICT,
MCMULLEN INDEPENDENT SCHOOL DISTRICT,
MIAMI INDEPENDENT SCHOOL DISTRICT,
MIRANDO CITY INDEPENDENT SCHOOL DISTRICT,
NORTHWEST INDEPENDENT SCHOOL DISTRICT,
PINETREE INDEPENDENT SCHOOL DISTRICT,
PLANO INDEPENDENT SCHOOL DISTRICT,
PROSPER INDEPENDENT SCHOOL DISTRICT,
QUITMAN INDEPENDENT SCHOOL DISTRICT,
RAINS INDEPENDENT SCHOOL DISTRICT,
RANKIN INDEPENDENT SCHOOL DISTRICT,
RICHARDSON INDEPENDENT SCHOOL DISTRICT,
RIVIERA INDEPENDENT SCHOOL DISTRICT,
ROCKDALE INDEPENDENT SCHOOL DISTRICT,
SHELDON INDEPENDENT SCHOOL DISTRICT,
STANTON INDEPENDENT SCHOOL DISTRICT,
SUNNYVALE INDEPENDENT SCHOOL DISTRICT,
WILLIS INDEPENDENT SCHOOL DISTRICT, and
WINK-LOVING INDEPENDENT SCHOOL DISTRICT.

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STATEMENT OF THE CASE

This is a direct appeal from a declaratory judgment by the Travis County District Court holding that Article I of Senate Bill 1, which was passed by the Legislature on June 5, 1990, and signed into law by the Governor on June 7, 1990, does not "establish and make suitable provision for the support and maintenance of an efficient system of free public schools," as required by Article VII, Section 1, of the Constitution of Texas, as interpreted by the Supreme Court of Texas in Edgewood I.S.D. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

STATEMENT OF INTEREST

KLEIN INDEPENDENT SCHOOL DISTRICT (KISD) fully supports the position of the Plaintiffs and Plaintiff-Intervenors in this case, and joins them in urging the Court to hold that Senate Bill 1 is, and the system of school finance in Texas remains, unconstitutional under the Supreme Court's mandate in this case. Rather than taking this opportunity to reurge each of the arguments made by the Plaintiffs and Plaintiff-Intervenors in support of this position, however, KISD believes that the greatest service that it can perform as Amicus Curiae is to succinctly demonstrate the continuing

unconstitutionality of the Texas school finance system in the context of its application to KISD.

The plight of KISD, and school districts like it, appears to be lost in the simplistic, common-place notion that the controversy in this case is between the upper and lower economic stratas of our state's population, i.e., the haves versus the have nots. However, as the district court recognized, the unconstitutionality of our school finance system crosses all stratas, economic, sociological and otherwise. (district court opinion at 22)

To the world, KISD is viewed as a rich or wealthy school district, and, perhaps, one of the least likely districts to join Edgewood ISD, et al., in their search for a constitutional system of school finance. Indeed, in terms of the average income of the households in KISD, perhaps it could be considered one of the more affluent areas of this state with parents who have predictable aspirations for their children. But, the KISD is, in fact, a poor school district. It is poor because its tax base consists mainly of residential property. (district court opinion at 23) Very little commercial and industrial property is included on the tax roll. KISD, like the Plaintiffs and Plaintiff-Intervenors, will remain a poor school district unless and until such time that the school finance system is really changed to meet this Court's mandate.

The anomalous position that KISD finds itself in is demonstrated by the fact that while it is the 25th largest school district in the state, it is ranked 461st from the bottom in terms of wealth per student (\$146,416) based on 1988 taxable value (\$3,323,421,341.00). (district court opinion at 23) Of the twenty school districts located wholly in Harris County, it is also the third poorest behind North Forest ISD and Huffman ISD. As a

result of its extremely rapid growth (i.e., from 1600 students in the 1969-70 school year, to 26,000 students in the 1990-91 school year), it has had to undergo a near unprecedented building program, increasing the number of campuses from nine to twenty-three in just ten years. (district court opinion at 23) The effect of such growth in an area that is primarily residential and has relatively little commercial property, has been to place enormous strain on the local homeowner, with a current tax rate of \$1.43 per \$100.00 of assessed valuation at 100% of market value. Even with such a tax rate, higher than most of the school districts in Harris County, KISD finds itself expending a comparatively modest amount for maintenance and operating cost per student (excluding capital outlay and debt service) of \$3,414.47. Moreover, there appears to be no relief in sight, as the population of the Klein area continues to mushroom, with projected enrollments expected to increase at the rate of 1,000 students per year for the next several years and at a considerably faster pace up to the turn of the century. When the area is completely developed, according to current projections, KISD will have approximately 65,000 students housed in 55 schools (36 elementary, 12 intermediate, and 7 high schools, compared to the current number of 14 elementary, 6 intermediate, and 3 high schools). (district court opinion at 22-23) Under Senate Bill 1, the inefficiency and inequity of the local property tax system will continue to haunt KISD and all property-poor school districts throughout the state.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT SENATE BILL 1 FAILS TO COMPLY WITH THE SUPREME COURT'S MANDATE: THE TEXAS PUBLIC SCHOOL FINANCE SYSTEM WILL REMAIN UNCONSTITUTIONAL UNLESS AND

**UNTIL SUCH TIME AS THE SYSTEM OF LOCAL PROPERTY TAXATION IS
FUNDAMENTALLY CHANGED.**

When this Court's decision in Edgewood v. Kirby is read today, in the face of the legislative response represented by Senate Bill 1, even the most dispassionate observer must react with the sense that nothing has really changed. The fundamental premise upon which this Court based its finding that our system of school finance violated the efficiency clause of Article VII, Section 1 of the Texas Constitution (i.e., reliance on local ad valorem property taxation with inherent disparities in taxable property wealth from district to district), remains the same. Indeed, stripped to its essentials, all that Senate Bill 1 accomplishes is precisely what the Court prophetically cautioned would not be enough:

The legislature's recent efforts have focused primarily on increasing the state's contributions. More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A band-aid will not suffice; the system itself must be changed.

Edgewood v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

Under the terms of the Supreme Court's order, the legislature was required to enact "a constitutionally sufficient plan" and "provide for an efficient system of education." What the legislature has provided by way of Senate Bill 1, as the district court noted, is merely the commitment of more money during the next school year to a funding formula which differs in no meaningful respect from House Bill 72. Admittedly, Senate Bill 1 does also create new layers of bureaucracy to study and report back to the legislature, and these reports may ultimately result in some modifications in the current funding formula. At bottom, however, the legislative product still fails to satisfy the Court's mandate of an

"efficient system" and a "constitutionally sufficient plan." That will clearly remain the case until such time as the means of taxation utilized to finance the system is fundamentally changed.

The effect of being property poor in a system which relies on local ad valorem taxation is a matter of historical record. Whether you are in Edgewood ISD or Klein ISD, the effect of being property poor differs only in degree. For those in the plaintiff class it means high dropout rates, poor educational achievement and decaying facilities. For those such as KISD whose patrons have had the wherewithal and willingness (at least, to date) to invest a disproportionate amount of local funds into the school system, it still means a continuing inability to compete for teachers with neighboring, wealthier districts. Nothing in Senate Bill 1 will insure that this historical pattern is not endlessly repeated. Under Senate Bill 1, "senior state policy makers" will biennially analyze the performance of the state's funding system to determine whether significant funding disparities have occurred in the prior two years. If such funding disparities are perceived, then adjustments may (but do not have to) be made in the next biennial cycle. In short, the self-correcting function of Senate Bill 1 is no different than the historic performance of the Texas legislature with respect to educational funding -- it does nothing to "insure" that property poor school districts will not continue to suffer from inadequate funding.

Moreover, even with its high level of local funding, KISD will, in due course, also join its sister, property-poor districts, in their inability to have facilities which meet student demand. In describing the deficiencies of the Texas funding system this Court noted, "most importantly, there are no Foundation School Program allotments for school facilities

or for debt service," and the Court affirmed the trial court judgment which had included "facilities and equipment" in its mandate for equalization. A school district such as KISD, with its explosive growth and continuing demand for new schools to accommodate such growth, is afforded no meaningful relief under Senate Bill 1, at least in the short term, with the burden of ever increasing debt service payments. For the past eight months, in fact, the Board of Trustees and school administration have been making plans for a January 1991 schoolhouse bond election in which KISD residents will be asked to approve as much as \$100,000,000 for new facilities and for renovation purposes. (district court opinion at 22-23)

With a tax rate of \$1.43 and the likelihood of an additional 15% increase within the next twelve months just to keep pace, the meaning of the Court's mandate in this case becomes ever the more remote for KISD;

There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide.

Edgewood v. Kirby, 777 S.W.2d at 391. So long as our school finance system is based in anyway on the present form of local ad valorem property taxation, this "direct and close correlation" simply cannot and will not occur.

CONCLUSION

KISD submits, as this Court has warned, that the inefficiency and inequity in school funding cannot be solved simply by formulas developed to redistribute state aid. The inherent unconstitutionality of our system lies in the uneven distribution of taxable property and the state's reliance on the local property tax as a means of finance. Any legislative solution must address this problem. Factories, oil fields, shopping centers and all other types of commercial and industrial property exist without respect to school district boundaries. The "efficiency" demanded by Article VII, Section 1 of the Texas Constitution, as underscored by the Court's mandate in this case, simply cannot exist when the quality of a child's education depends upon the tax base of the school district in which he/she resides. Such "efficiency" will not exist unless our system of finance is fundamentally changed so as to eliminate the property-poor versus the property-rich distinction in school districts, either by a sharing of tax values on a county-wide or state-wide basis, or the elimination of local property taxation altogether.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, KISD, on behalf of Plaintiffs and Plaintiff-Intervenors pray that the trial court's judgment be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 1990, a true and correct copy of the foregoing was served on all counsel of record by placing same in the U.S. Mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

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AMICUS RESPONDENT

Edgewood Independent School District, et al
Appellants
IN THE SUPREME COURT
OF TEXAS

v.

NOV 27 1990

William Kirby, et al
Appellees
JAMES ADAMS, Clerk

By _____ Deputy

AMENDED AMICUS CURIAE BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, William Berka, a citizen and taxpayer of the State of Texas, a resident of Denton County, files this petition, PRO SE, and moves the court to file and consider the attached Amicus Curiae Brief in support of William Kirby, et al, Appellees.

This Court has again been asked to rule upon the constitutionality of a bill passed by the legislature regarding the public education system in Texas. This brief will address only part of the question that this court has been requested to resolve. I will address the question of the requirements of the constitution in Article VII, section 1 and Article 1. "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people. . .". In Article 1, Section 2 it is provided: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient." In Section 19, it provides: No citizen of this state shall be deprived of life, liberty, property, privileges or immunities or in any manner disfranchised, except by the due course

of the law of the land; In Section 29 it provides: To guard against the transgressions of the high powers being delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions shall be void."

I believe that most of the parties to this issue will agree that reading, writing, and arithmetic are basic educational objectives desired by all of the parties to this conflict. Should there be more? Perhaps, there should be reading, writing, arithmetic, rhetoric, and rights? Prior to the 19th century, rhetoric was also a requirement before one was considered to be learned in the letters. How about rights? In this brief we are asserting the rights contained in the Bill of Rights, and in addition thereto, we are asserting a right forgotten about during the present time in the educational process. This is the right to be read and instructed in our rights. The law, at common law, certainly precedes the requirements established by the Texas Supreme Court at a cutoff date in 1840. Anything that was common law prior to that time can and should be considered when considering a question of the magnitude of the one before this court.

The common law that existed prior to the 1840 baseline was enacted in 1300 by King Edward I. It provides: The Great Charter and the Charter of the Forest shall be firmly kept and maintained in all points. That the Charters be delivered to every sheriff of England under the King's seal, to be read four times a year before the people in the full county, that is at the county court, that is to wit; the next county court after the Feast of Saint Michael, and the next county court after Christmas, and at the next county court

after Easter, and at the next county court after the Feast of Saint John. 28 Edward I, Ch. 1, (1300)

A consideration by this court on the constitutionality of a question of funds should not be considered without considering the other question. What will the money be used for? If the money is to be used to systematically deprive the people of knowledge about their liberties and rights, as it has been since 1836, this court will not achieve both objectives required in the preamble to the education code. A promise made should be a promise kept. This court, the court of last resort, has the ultimate responsibility to see that the promise of knowledge of one's liberties and rights are kept.

Looking back over history, perhaps, it was the duty of the political parties, the Republican and the Democrat. parties, to demand that the people be read and instructed in their liberties and rights, they didn't do it either. Maybe it was assumed the legislature would do it, they assumed the executive would do it, the executive assumed the Texas Education Agency would do it, the Texas Education Agency assumed the local school district would do it, and in the end not one agency would do it. So who is it left up to, to educate the people of their rights? Maybe it was meant to be that one person, Thomas Jefferson once said that one person could be a majority, to bring this matter to the attention of a tribunal such as this one and ask for a remedy that he has been deprived of all of these years. Do we have to continue this cumulative error and commission by the majority of the minority, who have the power of purse and sword, and inheritors of power to subtly and pervasively oppress the people by denying them knowledge of their liberties and rights.

Where did the term "diffusion of knowledge" come from? My research indicates that it was probably used for the first time in *Commonwealth v. Caton, Virginia, 1782*. The decision was written by Justice George Wythe, Thomas Jefferson's law mentor and friend. "It is said, that this was the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal, and the firmness of the judges, was highly honorable to them, and will always be applauded, as having incidently fixed a precedent, whereon a general practice, which the people of this country think essential to their rights and liberties, has been established. p 416

This case involved three men that were condemned to execution for treason. "Even a constitution is naught but empty words if it cannot be enforced by the courts." p 403 In his opinion Justice Wythe wrote: Among all the advantages which have arisen to mankind from the study of letters, and the universal diffusion of knowledge,* there is none of more importance than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, general liberty promoted. But this beneficial result attains to higher perfection, when those who hold the purse and sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them . . . I have heard of an English Chancellor who said, and it was nobly said,

that it was his duty to protect the rights of the subject against the encroachments of the Crown, and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine, to protect one branch of the legislature and consequently, the whole community, against the usurpations of the other; and whenever the proper occasion occurs, I shall feel the duty, and fearlessly perform it. . . . Nay more, if the whole legislature, an event to be deprecated, should attempt to overlap the bounds described to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal, and pointing to the constitution, will say so to them, here is the limit of your authority, and hither shall you go, but no further. p 412 The Roots of the Bill of Rights, Bernard Schwartz, 1971

In its decision, this Supreme Court on October 2, 1989 provided: This is not an area in which the constitution vests exclusive discretion in the legislature . . . This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make suitable provision for an efficient system for the essential purpose of a general diffusion of knowledge. . . . Other delegates recognized the importance of a diffusion of knowledge among the masses not only for the preservation of democracy, but for the prevention of crime and for the growth of the economy. . . . The present system, by contrast, provides not for a diffusion of knowledge that is general, but for one that is limited and unbalanced. . . .

Is this idea of being read one's liberties and rights farfetched? Does anybody else in a position of leadership profess interest in the issue? In a speech before the Texas Association of Concerned Taxpayers, Inc., TACT, in October, 1990, in Milam County, Cameron, Texas, Justice Oscar Mauzy proposed that all children receive an education in their Bill of Rights. He is not alone in this position. Retired Supreme Court Justice, William Brennan, Jr reported: Teaching the Bill of Rights can't start soon enough. Many education programs don't even mention the fact that there is a Bill of Rights. You can go to school and ask children, "Can you name the Bill of Rights?" and they answer "No." They don't even know what you are talking about." October 31, 1990.

Are educators taught the Bill of Rights? No they aren't. In their standard textbook, the School Law Bulletin, one section is mentioned, and that is Section 27, the right to petition. They used that provision to get this case before this court so that they could get a pay raise. Is ^{that} the only purpose that this section should be used for by educators? They use it to reward themselves at the expense of their students. What kind of justice is that. It appears to be impropriety at least.

According to SMU Magazine, Fall 1990, The Number of Texas high school graduates decreased by 4,471 from 1989 to 1990. . . will continue to fall until 1993. p 3. Why is it that the state is increasing taxes to pour more money into an education system that is losing students due to demographic changes in the population? In its first opinion, this court provided: Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the

the specifics of the legislation it should enact; nor do we order it to raise taxes. . .

I am attaching a copy of a letter written by the Federal Farmer, purportedly Richard H. Lee, January 20, 1788, that mentions that the people should be read and instructed in their rights. p 81 and 86. I am also enclosing a copy of the Concessions and Agreements of West New Jersey, 1677 that ordered: they be writ in fair tables, in every common hall of justice within this province and be read four times a year to the people." Somewhere, along the way, the majority of the minority forgot to keep reminding the people of their rights and liberties. Maybe it is time that this majority of the minority be reminded once more that the people are ready to be read and instructed in their rights and liberties. Surely, it would mark progress for the people of Texas for this court to recognize the evil and propose a remedy. This idea would put Texas ahead of everyone else and declare to the nation that individual rights and liberties are inalienable and any omission or commission by any governmental agency contrary thereto would be void.

I believe that the implementation of this idea should be kept separate from the judicial system. It should be supervised by the executive branch through the Governor and the sheriff of each county. These leaders are elected and can be held personally responsible for implementing the program. If it is assigned to the existing bureaucracies the idea will be killed before it gets off the ground. The result will be: The more things change, the more they remain the same.

THEREFORE, it is prayed:

1. That this court recognize theevil and suggest a remedy.
2. That thiscourt recognize that the people have a right at common law to be read and instructed in their rights under the auspices of the Bill of Rights. It would therefore be far more beneficial if the right could be found under the pneumbra of the existing Bill of Rights provisions, rather than the Federal Bill of Rights under the Ninth Amendment.
3. That the court order the legislature to implement this provision by datecertain.
4. That the persons responsible for the program come from the executive branch. The Governorshall design and distribute the program, while the sheriff shall be responsible for the local instruction.

RESPECTFULLY SUBMITTED,

William Berka

William Berka
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A dissenting minority feels free only when it can impose its will on the majority; what it abominates most is the dissent of the majority. Eric Hoffer

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of This Amended Amicus Curiae brief has been served by First Class, US mail upon the following named counsel on November 26, 1990.

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William Berka

William Berka

The Anti-Federalist

*An Abridgment, by Murray Dry, of
The Complete Anti-Federalist
Edited, with Commentary and Notes, by
Herbert J. Storing*

The University of Chicago Press
Chicago and London

Letters

people will require a representation in the new one that in fifty or an hundred years the representation will be numerous.

That congress will have no temptation to do wrong; and that no system to enslave the people is practicable

That as long as the people are free they will preserve free governments; and that when they shall become tired of freedom, arbitrary government must take place.

These observations I shall examine in the course of my letters; and, I think, not only shew that they are not well founded, but point out the fallacy of some of them; and shew that others do not very well comport with the dignified and manly sentiments of a free and enlightened people.

The Federal Farmer.

XVI

January 20, 1788.

Dear Sir,

Having gone through with the organization of the government. I shall now proceed to examine more particularly those clauses which respect its powers. I shall begin with those articles and stipulations which are necessary for accurately ascertaining the extent of powers, and what is given, and for guarding, limiting, and restraining them in their exercise.¹¹⁵ We often find, these articles and stipulations placed in bills of rights; but they may as well be incorporated in the body of the constitution, as selected and placed by themselves. The constitution, or whole social compact, is but one instrument, no more or less, than a certain number of articles or stipulations agreed to by the people, whether it consists of articles, sections, chapters, bills of rights, or parts of any other denomination, cannot be material. Many needless observations, and idle distinctions, in my opinion, have been made respecting a bill of rights. On the one hand, it seems to be considered as a necessary distinct limb of the constitution, and as containing a certain number of very valuable articles, which are applicable to all societies: and, on the other, as useless, especially in a federal government, possessing only enumerated power—nay, dangerous, as individual rights are numerous, and not easy to be enumerated in a bill of rights, and from articles, or stipulations, securing some of them, it may be inferred, that others not mentioned are surrendered.¹¹⁶ There appears to me to be general indefinite propositions without much meaning—and the man who first advanced those of the

2.8.196

latter description, in the present case, signed the federal constitution, which directly contradicts him.¹¹⁷ The supreme power is undoubtedly in the people, and it is a principle well established in my mind, that they reserve all powers not expressly delegated by them to those who govern; this is as true in forming a state as in forming a federal government. There is no possible distinction but this founded merely in the different modes of proceeding which take place in some cases. In forming a state constitution, under which to manage not only the great but the little concerns of a community: the powers to be possessed by the government are often too numerous to be enumerated; the people to adopt the shortest way often give general powers, indeed all powers, to the government, in some general words, and then, by a particular enumeration, take back, or rather say they however reserve certain rights as sacred, and which no laws shall be made to violate; hence the idea that all powers are given which are not reserved: but in forming a federal constitution, which *ex vi termine*, supposes state governments existing, and which is only to manage a few great national concerns, we often find it easier to enumerate particularly the powers to be delegated to the federal head, than to enumerate particularly the individual rights to be reserved; and the principle will operate in its full force, when we carefully adhere to it. When we particularly enumerate the powers given, we ought either carefully to enumerate the rights reserved, or be totally silent about them; we must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved, particularly to enumerate the former and not the latter, I think most advisable: however, as men appear generally to have their doubts about these silent reservations, we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up. People, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles, knowing that in any controversy between them and their rulers, concerning those rights, disputes may be endless, and nothing certain:—But admitting, on the general principle, that all rights are reserved of course, which are not expressly surrendered, the people could with sufficient certainty assert their rights on all occasions, and establish them with ease, still there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved. We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the

usefulness of a truth in theory, to people, and has their assent:—v the press, and the trial by jury America of course believe to be piness, and this belief in them is by a few able men, and of subse other countries hear these right they think the privilege of existir them. Why this difference amo reason of the difference is obvio notions impressed upon the min declarations. When the people formed Magna Charta, they dic indisputably entitled to certain n on silent titles, they, by a declar explicitly declared to all the wo rights; they made an instrument thought essential, or in danger, and therefore, that the people n become prepared for arbitrary leaders caused this instrument t read twice a year in public place such confirmations, but to fix the they successively come upon ti remain free, merely because th rights; men in all countries are e once got together and enumerate negotiations and declarations, al course to believe them to be sa wisdom of our past conduct, as i that we were entitled to freedd addresses, bills of rights, in nev which our freedom must always

It is not merely in this point constitution additional declarate that all powers not given are re constitution, as I shall particula this, the people, by adopting the powers to congress, in the con question may be effected. Gentl further declaratory articles, see imperfect manner. These have fo the rights reserved, but principa in certain material points, and to known boundaries. Many expla

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he federal constitution, which power is undoubtedly in the my mind, that they reserve all those who govern; this is as true government. There is no possible different modes of proceeding state constitution, under which concerns of a community: the are often too numerous to be way often give general powers, general words, and then, by a say they however reserve cer- be made to violate; hence the ot reserved: but in forming a supposes state governments v great national concerns, we the powers to be delegated to arly the individual rights to be s full force, when we carefully te the powers given, we ought rved, or be totally silent about both, or else suppose the par- quately draws the line between enumerate the former and not is men appear generally to have ns, we might advantageously eneral words, according to the ation, declare all powers, rights explicitly and expressly given express and explicit about their im them on the precarious and eral principles, knowing that in rulers, concerning those rights, in:—But admitting, on the gen- course, which are not expressly it certainty assert their rights on still there are infinite advantages st essential rights reserved in all e may declare in general terms, rved. We do not by declarations truths, but we give existence, or truths and principles which they soon forgot. If a nation means its uration, it ought to recognize the of every family book. What is the

usefulness of a truth in theory, unless it exists constantly in the minds of the people, and has their assent:—we discern certain rights, as the freedom of the press, and the trial by jury, &c. which the people of England and of America of course believe to be sacred, and essential to their political happiness, and this belief in them is the result of ideas at first suggested to them by a few able men, and of subsequent experience: while the people of some other countries hear these rights mentioned with the utmost indifference: they think the privilege of existing at the will of a despot much preferable to them. Why this difference amongst beings every way formed alike. The reason of the difference is obvious—it is the effect of education, a series of notions impressed upon the minds of the people by examples, precepts and declarations. When the people of England got together, at the time they formed Magna Charta, they did not consider it sufficient, that they were indisputably entitled to certain natural and unalienable rights, not depending on silent titles, they, by a declaratory act, expressly recognized them, and explicitly declared to all the world, that they were entitled to enjoy those rights; they made an instrument in writing, and enumerated those they then thought essential, or in danger, and this wise men saw was not sufficient: and therefore, that the people might not forget these rights, and gradually become prepared for arbitrary government, their discerning and honest leaders caused this instrument to be confirmed near forty times, and to be read twice a year in public places, not that it would lose its validity without such confirmations, but to fix the contents of it in the minds of the people, as they successively come upon the stage.—Men, in some countries do not remain free, merely because they are entitled to natural and unalienable rights; men in all countries are entitled to them, not because their ancestors once got together and enumerated them on paper, but because, by repeated negotiations and declarations, all parties are brought to realize them, and of course to believe them to be sacred. Were it necessary, I might shew the wisdom of our past conduct, as a people in not merely comforting ourselves that we were entitled to freedom, but in constantly keeping in view, in addresses, bills of rights, in news-papers, &c. the particular principles on which our freedom must always depend.¹¹⁸

It is not merely in this point of view, that I urge the engrafting in the constitution additional declaratory articles. The distinction, in itself just, that all powers not given are reserved, is in effect destroyed by this very constitution, as I shall particularly demonstrate—and even independent of this, the people, by adopting the constitution, give many general undefined powers to congress, in the constitutional exercise of which, the rights in question may be effected. Gentlemen who oppose a federal bill of rights, or further declaratory articles, seem to view the subject in a very narrow imperfect manner. These have for their objects, not only the enumeration of the rights reserved, but principally to explain the general powers delegated in certain material points, and to restrain those who exercise them by fixed known boundaries. Many explanations and restrictions necessary and use-

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ful, would be much less so, were the people at large all well and fully acquainted with the principles and affairs of government. There appears to be in the constitution, a studied brevity, and it may also be probable, that several explanatory articles were omitted from a circumstance very common. What we have long and early understood ourselves in the common concerns of the community, we are apt to suppose is understood by others, and need not be expressed; and it is not unnatural or uncommon for the ablest men most frequently to make this mistake. To make declaratory articles unnecessary in an instrument of government, two circumstances must exist; the rights reserved must be indisputably so, and in their nature defined; the powers delegated to the government, must be precisely defined by the words that convey them, and clearly be of such extent and nature as that, by no reasonable construction, they can be made to invade the rights and prerogatives intended to be left in the people.

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The first point urged, is, that all power is reserved not expressly given, that particular enumerated powers only are given, that all others are not given, but reserved, and that it is needless to attempt to restrain congress in the exercise of powers they possess not. This reasoning is logical, but of very little importance in the common affairs of men; but the constitution does not appear to respect it even in any view. To prove this, I might cite several clauses in it. I shall only remark on two or three. By article 1, section 9, "No title of nobility shall be granted by congress" Was this clause omitted, what power would congress have to make titles of nobility? in what part of the constitution would they find it? The answer must be, that congress would have no such power—that the people, by adopting the constitution, will not part with it. Why then by a negative clause, restrain congress from doing what it would have no power to do? This clause, then, must have no meaning, or imply, that were it omitted, congress would have the power in question, either upon the principle that some general words in the constitution may be so construed as to give it, or on the principle that congress possess the powers not expressly reserved. But this clause was in the confederation, and is said to be introduced into the constitution from very great caution. Even a cautionary provision implies a doubt, at least, that it is necessary; and if so in this case, clearly it is also alike necessary in all similar ones. The fact appears to be, that the people in forming the confederation, and the convention, in this instance, acted, naturally, they did not leave the point to be settled by general principles and logical inferences; but they settle the point in a few words, and all who read them at once understand them.

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The trial by jury in criminal as well as in civil causes, has long been considered as one of our fundamental rights, and has been repeatedly recognized and confirmed by most of the state conventions.¹¹⁹ But the constitution expressly establishes this trial in criminal, and wholly omits it in civil causes. The jury trial in criminal causes, and the benefit of the writ of

habeas corpus, are already as mental or essential rights of the case, why in adopting a federal omit all others, or all others, agreeing there shall be no ex must consider this constitution people, and in construing it h adhere to the letter and spirit c construing the federal constitution improper to refer to the state struments and inferior acts: be tain fundamental rights, it is st they would not otherwise be s regarded in the federal admini: rights, being established by t people, our recognizing them insecure by the state establish new arrangement of the social people, thus establishing some others similarly circumstance mean to relinquish the latter, c therefore, inferred from gener hardly ascertainable in the co forming a federal constitution, to be thus circumstanced, a establish some of them, the cor which they esteem valuable an especially having began, ougl particularly all the rights of in in question in making and exe upon the excellency and impo criminal causes, instead of est to establish it generally;—inst tive to this subject, why not u this country, and say, "the j entitled to the trial by jury." I sacred, and enjoin it upon con all cases, according to the usa before, that it is *the jury trial* modifications tacked to it in th the ocean: the jury trial is a so the substance we would save.

Security against expost facti writ of habeas corpus, are but

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le at large all well and fully government. There appears to it may also be probable, that on a circumstance very com- od ourselves in the common pose is understood by others. natural or uncommon for the mistake. To make declaratory overnment, two circumstances putably so, and in their nature ment, must be precisely defined be of such extent and nature as n be made to invade the rights eople.

s reserved not expressly given. e given, that all others are not o attempt to restrain congress in his reasoning is logical, but of rs of men; but the constitution ew. To prove this, I might cite on two or three. By article 1. ed by congress" Was this clause o make titles of nobility? in what The answer must be, that con- eople, by adopting the constitu- egative clause, restrain congress do? This clause, then, must have , congress would have the power some general words in the con- or on the principle that congress l. But this clause was in the con- o the constitution from very great plies a doubt, at least, that it is it is also alike necessary in all t the people in forming the con- stance, acted, naturally, they did principles and logical inferences; , and all who read them at once

habeas corpus, are already as effectually established as any of the funda- mental or essential rights of the people in the United States. This being the case, why in adopting a federal constitution do we now establish these, and omit all others, or all others, at least with a few exceptions, such as again agreeing there shall be no ex post facto laws, no titles of nobility, &c. We must consider this constitution, when adopted, as the supreme act of the people, and in construing it hereafter, we and our posterity must strictly adhere to the letter and spirit of it, and in no instance depart from them: in construing the federal constitution, it will be not only impracticable, but improper to refer to the state constitutions. They are entirely distinct in- struments and inferior acts: besides, by the people's now establishing cer- tain fundamental rights, it is strongly implied, that they are of opinion, that they would not otherwise be secured as a part of the federal system, or be regarded in the federal administration as fundamental. Further, these same rights, being established by the state constitutions, and secured to the people, our recognizing them now, implies, that the people thought them insecure by the state establishments, and extinguished or put afloat by the new arrangement of the social system, unless re-established.—Further, the people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them. Rights, therefore, inferred from general principles of reason, being precarious and hardly ascertainable in the common affairs of society, and the people, in forming a federal constitution, explicitly shewing they conceive these rights to be thus circumstanced, and accordingly proceed to enumerate and establish some of them, the conclusion will be, that they have established all which they esteem valuable and sacred. On every principle, then, the people especially having began, ought to go through enumerating, and establish particularly all the rights of individuals, which can by any possibility come in question in making and executing federal laws. I have already observed upon the excellency and importance of the jury trial in civil as well as in criminal causes, instead of establishing it in criminal causes only; we ought to establish it generally;—instead of the clause of forty or fifty words rela- tive to this subject, why not use the language that has always been used in this country, and say, "the people of the United States shall always be entitled to the trial by jury." This would shew the people still hold the right sacred, and enjoin it upon congress substantially to preserve the jury trial in all cases, according to the usage and custom of the country. I have observed before, that it is *the jury trial* we want; the little different appendages and modifications tacked to it in the different states, are no more than a drop in the ocean: the jury trial is a solid uniform feature in a free government; it is the substance we would save, not the little articles of form.

Security against ex post facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of

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the United States are entitled to, even in judicial proceedings, by the course of the common law. These may be secured in general words, as in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England. In this case, the people may proceed to declare that no man shall be held to answer to any offence, till the same be fully described to him; nor to furnish evidence against himself: that, except in the government of the army and navy, no person shall be tried for any offence, whereby he may incur loss of life, or an infamous punishment, until he be first indicted by a grand jury: that every person shall have a right to produce all proofs that may be favourable to him, and to meet the witnesses against him face to face: that every person shall be entitled to obtain right and justice freely and without delay; that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land. A celebrated writer observes upon this last article, that in itself it may be said to comprehend the whole end of political society.¹²⁰ These rights are not necessarily reserved, they are established, or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws. In the execution of those laws, individuals, by long custom, by magna charta, bills of rights &c. have become entitled to them. A man, at first, by act of parliament, became entitled to the benefits of the writ of habeas corpus—men are entitled to these rights and benefits in the judicial proceedings of our state courts generally: but it will by no means follow, that they will be entitled to them in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws. We certainly, in federal processes, might as well claim the benefits of the writ of habeas corpus, as to claim trial by a jury—the right to have council—to have witnesses face to face—to be secure against unreasonable search warrants, &c. was the constitution silent as to the whole of them:—but the establishment of the former, will evince that we could not claim them without it: and the omission of the latter, implies they are relinquished, or deemed of no importance. These are rights and benefits individuals acquire by compact; they must claim them under compacts, or immemorial usage—it is doubtful, at least, whether they can be claimed under immemorial usage in this country; and it is, therefore, we generally claim them under compacts, as charters and constitutions.

The people by adopting the powers to institute a distinct and all proceedings in them, under letter: and the further one, that enjoyed by individuals. Thus general and regulate their proceedings, principally in question, may not constitutionally too, as to destruction are not in any degree secured. • would it not be prudent and wise since all agree the people ought men excepted, who seem to be in them? Were it necessary in value and political importance.

The constitution will give our armies. General powers carry necessary to the end. In the execution in the constitution to prevent this you will answer, there is not. To measure in the support of armies: right to be exempt from this burden the country, and the provisions they will be answered, that their nature, but only in custom and in the state constitutions, which are can have no controul over the general federal constitution—had notice about this exemption—that the subject, which, in their operation is not to be presumed, that a quarter, yet it is fit and proper which are particularly valuable nency and duration of free government the English, always in possession of the value of it:¹²¹ we, at this time in some instances abused ours away for what we call energy, vaguely as that of liberty—The novelty in politics, as in amuse

All parties apparently agree, a natural right, and ought not to be manner whatever. Why should constitution, declare this, even if advocates, all powers not given is, are not powers given, in the

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The people by adopting the federal constitution, give congress general powers to institute a distinct and new judiciary, new courts, and to regulate all proceedings in them, under the eight limitations mentioned in a former letter; and the further one, that the benefits of the habeas corpus act shall be enjoyed by individuals. Thus general powers being given to institute courts, and regulate their proceedings, with no provision for securing the rights principally in question, may not congress so exercise those powers, and constitutionally too, as to destroy those rights? clearly, in my opinion, they are not in any degree secured. But, admitting the case is only doubtful, would it not be prudent and wise to secure them and remove all doubts, since all agree the people ought to enjoy these valuable rights, a very few men excepted, who seem to be rather of opinion that there is little or nothing in them? Were it necessary I might add many observations to shew their value and political importance.

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The constitution will give congress general powers to raise and support armies. General powers carry with them incidental ones, and the means necessary to the end. In the exercise of these powers, is there any provision in the constitution to prevent the quartering of soldiers on the inhabitants? you will answer, there is not. This may sometimes be deemed a necessary measure in the support of armies; on what principle can the people claim the right to be exempt from this burden? they will urge, perhaps, the practice of the country, and the provisions made in some of the state constitutions—they will be answered, that their claim thus to be exempt is not founded in nature, but only in custom and opinion, or at best, in stipulations in some of the state constitutions, which are local, and inferior in their operation, and can have no controul over the general government—that they had adopted a federal constitution—had noticed several rights, but had been totally silent about this exemption—that they had given general powers relative to the subject, which, in their operation, regularly destroyed the claim. Though it is not to be presumed, that we are in any immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government. An excellent writer observes, that the English, always in possession of their freedom, are frequently unmindful of the value of it:¹²¹ we, at this period, do not seem to be so well off, having, in some instances abused ours; many of us are quite disposed to barter it away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty—There is often as great a rage for change and novelty in politics, as in amusements and fashions.

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All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved:—true; but the great question is, are not powers given, in the exercise of which this right may be de-

stroyed? The people's or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right. This may be done by giving general powers, as well as by using particular words. No right claimed under a state constitution, will avail against a law of the union, made in pursuance of the federal constitution: therefore the question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the press? By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever—taxes on houses, lands, polls, industry, merchandize, &c.—taxes on deeds, bonds, and all written instruments—on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and constantly to constructions and inferences. A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniencies, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, "lastly the key stone was put to the arch, by the final establishment of the freedom of the press."¹²² I shall not dwell longer upon the fundamental rights, to some of which I have attended in this letter, for the same reasons that these I have mentioned, ought to be expressly secured, lest in the exercise of general powers given they may be invaded: it is pretty clear, that some other of less importance, or less in danger, might with propriety also be secured.

I shall now proceed to examine briefly the powers proposed to be vested in the several branches of the government, and especially the mode of laying and collecting internal taxes.

The Federal Farmer.

Dear Sir,

I believe the people of the U and mild government can be under the substantial forms o advocates for the system prop confessions they have publish not take up time to establish t that system partakes of a fede that it appears to be the first in that its strong tendency is to t

But what do we mean by a government? To erect a feder states on republican principles the internal management of its a federal head, and delegate to enumerated cases, under cer assembly, like the present con consist of a legislature, with or judiciary. To form a consolida no state, or local governments subject to the laws of one le judiciary. Each state governm a consolidated, or one entire g citizens and property within th are the basis, the pillar on wh together, when formed on elec A federal republic in itself sur the body or props, on which th a moment after they cease. In in its councils, each state mus ing this government, I conce pressed or implied assent of th direction of the government o do I conceive it to be necessar have an equal voice in the ger organized, each state must re and all delegate to the union p tity of power the union must p powers given, is quite a differ cising them, that makes one of or consolidated government. government may be organized

The Federal Farmer

tinental Congress and by several Anti-Federalists and which was the first sentence in the original introduction, was considerably altered in the revision, making the modern editions different in this crucial respect from those available to the American founding generation. See Cesare Beccaria, *Opere*, ed. Sergio Romagnoli (Florence 1958) I, 39; II, 862-63; Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci (Indianapolis 1963).

62. *The Spirit of Laws* XI, ch. 6.

63. See *Ibid.* II, ch. 2.

64. John Adams gave good and influential expression to the stock of ideas on the natural aristocracy upon which the Anti-Federalists drew. See his *Defence*, letter 25 (*Works* IV, 396-98). For other Anti-Federalist discussions of the natural aristocracy, see above, III, 2.8.25; Cato VI, 2.6.43; Brutus III, 2.9.42; [Maryland] Farmer II, 5.1.26-32; Smith 6.12.22 n. 24. For Federalist replies, see McMaster and Stone 335-36 (Wilson); Elliot II, 256 (Hamilton); *Carlisle Gazette* 24 October 1787 (A Citizen).

65. While the thought is a common one, I have not been able to find the specific source of the observation about merchants. Regarding the schools, John Adams wrote: "Monarchies and aristocracies are in possession of the voice and influence of every university and academy in Europe. Democracy, simple democracy, never had a patron among men of letters. Democratical mixtures in government have lost almost all the advocates they ever had out of England and America." John Adams, *Defence*, preface (*Works* IV, 280).

66. This consideration takes place in letters VIII-X, 2.8.102-42.

115. On bills of rights see above, II, 2.8.19-20.

116. See above, nn. 38, 39, 40. For Federalist arguments that a bill of rights would be dangerous, see *The Federalist* no. 84, 579; McMaster and Stone 143-44, 253-54 (Wilson), 189 (Plain Truth), 296 (Yeates); Ford, *Pamphlets* 242 (Aristides), 360 (Marcus); Elliot III, 191 (Randolph), 620 (Madison); Elliot IV, 141 (MacLaine), 142 (Johnston), 149, 167 (Iredell), 316 (General Pinckney).

117. James Wilson, "Address to the Citizens of Philadelphia," McMaster and Stone, 143-44. See Brutus II, 2.9.30 n. 22.

118. For other expressions of this important theme, see Old Whig IV, 3.3.21-24; Impartial Examiner 5.14.5, 10; Henry 5.16.35-38; Delegate Who Has Caught Cold 5.19.13-17; Sentiments of Many, *passim*. A good statement of this view of a bill of rights is provided by Edmund Randolph in commenting on the Virginia Declaration of Rights. See Bernard Schwartz, *The Bill of Rights* (New York 1971) I, 249.

119. See II, 2.8.16 n. 12.

120. Blackstone, *Commentaries on the Laws of England* III, 379.

121. [While the precise reference has not been located, the context suggests DeLolme. *The Constitution of England*, perhaps II, ch. 21. See text at n. 122 below (XVI, 2.8.203), which was located in DeLolme; see also text at n. 67 (VIII, 2.8.102), where The Federal Farmer identifies DeLolme and praises him.—M.D.]

122. DeLolme, *The Constitution of England* I, ch. 3.

123. See McMaster and Stone 264, 390 (Wilson); Ford, *Pamphlets* 39 (A Citizen of America), 121 (A Citizen of Philadelphia), 207 (Fabius), 247-48 (Aristides); Ford, *Essays* 238 (A Citizen of New Haven); Elliot II, 46 (Ames); Elliot IV, 58 (Davies). Publius, it should be noted, does not acknowledge this proposition. See *The Federalist* nos. 9, 15, 39. See Centinel V, 2.7.94.

124. I, 2.8.1.

125. Cf. *The Federalist*, esp. no. 23, 147-51; no. 31, 193-96.

126. See above, n. 80.

127. See *The Federalist* no. 28, 179; cf. the argument here with *The Federalist* no. 10.

128. See *The Federalist* no. 17, 107; no. 27, 172-73; McMaster and Stone 302, 325 (Wilson), Elliot II, 46 (Ames); 239, 267, 304, 354 (Hamilton); Elliot III, 18 (Nicholas), 257-59 (Madison). Cf. below, Brutus XI, 2.9.130 n. 87.

129. See Brutus V, 2.9.58-59; VI

130. See above, I, 2.8.10.

131. See Brutus XII, 2.9.155-57.

132. James Wilson, Philadelphia

The Roots of
**The BILL of
RIGHTS**

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Commentary

The next significant step in the Colonial development of guarantees of personal liberty occurred in New Jersey, which was set up as a Proprietary Colony in 1664. To attract settlers, the Proprietors (Lord John Berkeley and Sir George Carteret) issued the Concession and Agreement of February, 1664, which provided for freedom of religion in terms similar to those in the Rhode Island Charter, and self-government through an elected legislature. In 1674 Berkeley sold his interest to Edward Byllynge and other Quakers. New Jersey was then divided between Carteret and the Quakers, with the latter occupying the unoccupied western half.

In 1677, the Quaker Proprietors issued what has been termed one of the more remarkable documents in American history: "The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New Jersey." Chapters XIII-XXIII of this document was described in a subtitle as "The Charter or Fundamental Laws of West New Jersey, Agreed Upon."

The basic goal of the Concessions was stated by the Proprietors in a 1676 letter: "There we lay a foundation for after ages to understand their liberty as men and christians, that they may not be brought in bondage, but by their own consent; for we put the power in the people." They meant Chapters XIII-XXIII to serve as "the common law or fundamental rights and privileges . . . agreed upon . . . to be the foundation of the government." More than that, this fundamental law "is not to be altered by the Legislative authority" and the legislature is "to make such laws as agree with, and maintain the said fundamentals, and to make no laws that in the least contradict, differ or vary from the said fundamentals, under what pretence or allegation soever." Here we are very close to the seminal notion of a binding written Constitution and the doctrine of unconstitutional legislation.

Among the rights guaranteed by the 1677 Concessions were religious liberty (in terms even broader than those in the Rhode Island Charter from which it is derived), trial by jury, fair public trials, and freedom from imprisonment for debt. In addition, provision was made for wide dissemination of the Concessions, with the order that they "be writ in fair tables, in every common hall of justice within this Province" and be read four times a year to the people.

The West New Jersey Concessions marks an important step in the development which culminated in the federal Bill of Rights. It is not certain whether William Penn or Edward Byllynge was the primary author of the liberal guarantees. As was the case with the Massachusetts Body of Liber-

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ties, the West New Jersey Concessions extended the liberties belonging by right to its settlers beyond the limits recognized in the England of the day. And they did what English law had not yet done in their attempt to give specific content to the rights of the King's subjects. This was, indeed, to be the great American contribution to political science—the protection of individual rights through their specification in a written organic law, binding upon the possessors of governmental power for the time being.

Concessions and Agreements of West New Jersey, 1677*

*The Charter or Fundamental Laws, of
West New Jersey, Agreed Upon*

Chapter XIII

That these following concessions are the Common Law, or Fundamental Rights, of the Province of West New Jersey.

That the common law or fundamental rights and privileges of West New Jersey, are individually agreed upon by the Proprietors and freeholders thereof, to be the foundation of the government, which is not to be altered by the Legislative authority, or free Assembly hereafter mentioned and constituted, but that the said Legislative authority is constituted according to these fundamentals, to make such laws as agree with, and maintain the said fundamentals, and to make no laws that in the least contradict, differ or vary from the said fundamentals, under what pretence or alligation soever.

Chapter XIV

But if it so happen that any person or persons of the said General Assembly, shall therein designedly, willfully, and maliciously, move or excite any to move, any matter or thing whatsoever, that contradicts or any ways subverts, any fundamentals of the said laws in the Constitution of the government of this Province, it being proved by seven honest and reputable persons, he or they shall be proceeded against as traitors to the said government.

Chapter XV

That these Concessions, law or great charter of fundamentals, be recorded in a fair table, in the Assembly House, and that they be read at the beginning and dissolving of every general free Assembly: And it is further agreed and ordained, that the said Concessions, common law, or great charter of fundamentals, be writ in fair tables, in every common hall of justice within this Province, and that they be read in solemn manner four times every year, in the presence of the people, by the chief magistrates of those places.

*A. Leaming and J. Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New Jersey*, 2nd ed., (1881), pp. 393-98.

Chapter XVI

That no men, nor number of men, shall have rule over men's consciences in religion, agreed and ordained, that no person in this Province, at any time or times, shall use any pretence whatsoever, called in question either in person, estate, or privilege, to hinder any person, or persons, from their faith or worship towards God in such person, and persons, may fully have, and enjoy his and their consciences in matters of religious

Chapter XVII

That no Proprietor, freeholder, or freeholder of New Jersey, shall be deprived of his property or any ways hurt in his person, upon any account whatsoever, with twelve good and lawful men of his own free choice, to be tryed, and in all tryals except against any of the said proprietors, (not exceeding thirty five) and in every person nominated for that service

Chapter XVIII

And that no Proprietor, freeholder, or freeholder of this Province, shall be attached, arrested, or detained, for any debt, duty, or thing whatsoever (excepted) before he or she have paid his or her last dwelling place, if in the person of the officer, constituted and appointed of judicature for the said Province, or thing in demand, as also the next day after whose suit, and the court where he or she shall be fourteen days time to appear and answer, and inhabit within forty miles English distance, to have for every twenty days of their appearance, and so proportionally

That upon the recording of the person and persons, a writ or attachment, or arrest, or attach the person or persons, or appearance in such court, returnable or penalties, in such suit or suits; legal trial and judgment, the penalty out of his or their real or personal property, or persons so condemned, to lie in

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West New Jersey, 1677*

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Chapter XVI

That no men, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matters, therefore it is consented, agreed and ordained, that no person or persons whatsoever within the said Province, at any time or times hereafter, shall be any ways upon any pretence whatsoever, called in question, or in the least punished or hurt, either in person, estate, or privilege, for the sake of his opinion, judgment, faith or worship towards God in matters of religion. But that all and every such person, and persons, may from time to time, and at all times, freely and fully have, and enjoy his and their judgements, and the exercises of their consciences in matters of religious worship throughout all the said Province.

Chapter XVII

That no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and judgment passed by twelve good and lawful men of his neighbourhood first had: And that in all causes to be tryed, and in all tryals, the person or persons, arraigned may except against any of the said neighbourhood, without any reason rendered, (not exceeding thirty five) and in case of any valid reason alleged, against every person nominated for that service.

Chapter XVIII

And that no Proprietor, freeholder, freedemen, or inhabitant in the said Province, shall be attached, arrested, or imprisoned, for or by reason of any debt, duty, or thing whatsoever (cases felonious, criminal and treasonable excepted) before he or she have personal summon or summons, left at his or her last dwelling place, if in the said Province, by some legal authorized officer, constituted and appointed for that purpose, to appear in some court of judicature for the said Province, with a full and plain account of the cause or thing in demand, as also the name or names of the person or persons at whose suit, and the court where he is to appear, and that he hath at least fourteen days time to appear and answer the said suit, if he or she live or inhabit within forty miles English of the said court, and if at a further distance, to have for every twenty miles, two days time more, for his and their appearance, and so proportionably for a larger distance of place.

That upon the recording of the summons, and non-appearance of such person and persons, a writ or attachment shall or may be issued out to arrest, or attach the person or persons of such defaulters, to cause his or their appearance in such court, returnable at a day certain, to answer the penalty or penalties, in such suit or suits; and if he or they shall be condemned by legal tryal and judgment, the penalty or penalties shall be paid and satisfied out of his or their real or personal estate so condemned, or cause the person or persons so condemned, to lie in execution till satisfaction of the debt and

Debit

damages be made. Provided always, if such person or persons so condemned, shall pay and deliver such estate, goods, and chattles which he or any other person hath for his or their use, and shall solemnly declare and aver, that he or they have not any further estate, goods or chattles wheresoever, to satisfy the person or persons, (at whose suit, he or they are condemned) their respective judgments, and shall also bring and produce three other persons as compurgators, who are well known and of honest reputation, and approved of by the commissioners of that division, where they dwell or inhabit, which shall in such open court, likewise solemnly declare and aver, that they believe in their consciences, such person and persons so condemned, have not werewith further to pay the said condemnation or condemnations, he or they shall be thence forthwith discharged from their said imprisonment, any law or custom to the contrary thereof, heretofore in the said Province, notwithstanding. And upon such summons and default of appearance, recorded as aforesaid, and such person and persons not appearing within forty days after, it shall and may be lawful for such court of judicature to proceed to tryal, of twelve lawful men to judgment, against such defaulters, and issue forth execution against his or their estate, real and personal, to satisfy such penalty or penalties, to such debt and damages so recorded, as far as it shall or may extend.

Chapter XIX

That there shall be in every court, three justices or commissioners, who shall sit with the twelve men of the neighbourhood, with them to hear all causes, and to assist the said twelve men of the neighbourhood in case of law; and that they the said justices shall pronounce such judgment as they shall receive from, and be directed by the said twelve men, in whom only the judgment resides, and not otherwise.

And in case of their neglect and refusal, that then one of the twelve, by consent of the rest, pronounce their own judgment as the justices should have done.

And if any judgment shall be past, in any case civil or criminal, by any other person or persons, or any other way, then according to this agreement and appointment, it shall be held null and void, and such person or persons so presuming to give judgment, shall be severely fin'd, and upon complaint made to the General Assembly, by them be declared incapable of any office or trust within this Province.

Chapter XX

That in all matters and causes, civil and criminal, proof is to be made by the solemn and plain averment, of at least two honest and reputable persons; and in case that any person or persons shall bear false witness, and bring in his or their evidence, contrary to the truth of the matter as shall be made plainly to appear, that then every such person or persons, shall in civil causes, suffer the penalty which would be due to the person or persons he or

they bear witness against. And in behalf of any person or persons, it to have born false witness for to hinder the due execution of the persons of their due satisfaction. evidence, such person or persons, s or they shall forever be disabled any publick office, employment, or

Chapter XXI

That all and every person and p prefer any indictment or informati or matter criminal, or shall proseci murder, and felony, only excepte process, and have full power to offending against him or herself or condemnation, and pardon and re the person or persons offending. be

Chapter XXII

That the tryals of all causes, civi by the virdict or judgment of twel to be summoned and presented by where the fact or trespass is comit be compelled to fee any attorney o persons have free liberty to plead person nor persons imprisoned u Province, shall be obliged to pay a prison, either when committed or d

Chapter XXIII

That in all publick courts of ju any person or persons, inhabitan into, and attend the said courts, a tryals as shall be there had or p corner nor in any covert manner, t the Lord, and by these our Con every person and persons inhabiti lies, be free from oppression and s

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they bear witness against. And in case any witness or witnesses, on the behalf of any person or persons, indicted in a criminal cause, shall be found to have born false witness for fear, gain, malice or favour, and thereby hinder the due execution of the law, and deprive the suffering person or persons of their due satisfaction, that then and in all other cases of false evidence, such person or persons, shall be first severely fined, and next that he or they shall forever be disabled from being admitted in evidence, or into any publick office, employment, or service within this Province.

Chapter XXI

That all and every person and persons whatsoever, who shall prosecute or prefer any indictment or information against others for any personal injuries, or matter criminal, or shall prosecute for any other criminal cause, (treason, murther, and felony, only excepted) shall and may be master of his own process, and have full power to forgive and remit the person or persons offending against him or herself only, as well before as after judgment, and condemnation, and pardon and remit the sentence, fine and punishment of the person or persons offending, be it personal or other whatsoever.

Chapter XXII

That the tryals of all causes, civil and criminal, shall be heard and decided by the virdict or judgment of twelve honest men of the neighbourhood, only to be summoned and presented by the sheriff of that division, or propriety where the fact or trespass is committed: and that no person or persons shall be compelled to fee any attorney or counsellor to plead his cause, but that all persons have free liberty to plead his own cause, if he please: And that no person nor persons imprisoned upon any account whatsoever within this Province, shall be obliged to pay any fees to the officer or officers of the said prison, either when committed or discharged. To 24

Chapter XXIII

That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come OPEN into, and attend the said courts, and hear and be present, at all or any such COURTS tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner, being intended and resolved, by the help of the Lord, and by these our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery.

bers of the Legislative houses, judges of the court of Appeals, judges of the County courts, or other inferior jurisdictions, Privy counsellors, or Delegates to the American Congress: but the reasonable expences of the Administrator, members of the house of representatives, judges of the court of Appeals, Privy counsellors, & Delegates, for subsistence while acting in the duties of their office, may be borne by the public, if the Legislature shall so direct.

(The Qualifications of all officers not otherwise hereby directed, shall be an oath of fidelity to the state, and the having given no bribe to obtain their office) No person shall be capable of acting in any office, Civil, Military [or Ecclesiastical] who shall have given any bribe to obtain such office, or who shall not previously take an oath of fidelity to the state.

None of these fundamental laws and principles of government shall be repealed or altered, but by the personal consent of the people on summons to meet in their respective counties on one and the same day by an act of Legislature to be passed for every special occasion: and if in such county meetings the people of two thirds of the counties shall give their suffrage for any particular alteration or repeal referred to them by the said act, the same shall be accordingly repealed or altered, and such repeal or alteration shall take its place among these fundamentals & stand on the same footing with them, in lieu of the article repealed or altered.

The laws heretofore in force in this colony shall remain (still) in force, except so far as they are altered by the foregoing fundamental laws, or so far as they may be hereafter altered by acts of the Legislature.

Edmund Randolph's Essay*

As soon as the convention had pronounced the vote of independence, the formation of a constitution or frame of government followed of course. For with the royal authority, the existing organs of police and the laws ceased, and the tranquillity of society was floating upon the will of popular committees, and the virtue of the people.

To this work, then unprecedented in America, talents were requisite of a higher order, than those, which could foment a revolution. Patriotism, firmness and a just foresight of the dangers to be encountered, were sufficient to dissolve an empire. But the deepest research which had then been made here into the theory of government, seemed too short for those scenes, which the new order of things was to unfold, and for those evils, which human passions, with new opportunities and solicitations must beget.

Mr. Jefferson, who was in congress, urged a youthful friend in the conven-

*E. Randolph, "Essay on the Revolutionary History of Virginia," *Virginia Magazine of History and Biography*, Vol. 44, (1936), pp. 43-47. According to Vol. 43 *id.* at 115-16, this essay was written after Randolph's retirement from office, near the end of his life—sometime between 1809 and 1813.

REVOLUTIONARY

tion, to oppose a permanent deputies for the special pi (as he conceived them to exceed some temporary residents of Mr. Jefferson toleton, Patrick Henry, and tion between the conceded consequence, the fencing were they sure, that to imply a distrust, whether attempt to postpone the greater multitude, and one task too hardy for an inexperienced

A very large committee and many projects of a bill for political notice, rather by George Mason swallow which after great discussion

The celebrated notes of former objections of its authors

"When the enemy shall be established, and leisure rights for which we have decline a little more trouble anything more may be recalling a convention at a

"The ordinary legislature defects in it of magnitude people to change it, as contributed to some degradation to. They have solemn recognitions, in order to be useless to revive a dismay be yet asked, whence for so many years various authorities, which rights, which have been established, with as little and that the constitution mate one shall be adopted be revoked by the legislature execute it, than the true happily, practical utility public safety.

court of Appeals, judges of the Privy counsellors, or Delegates the expences of the Administration judges of the court of Appeals, while acting in the duties of Legislature shall so direct.

wise hereby directed, shall be given no bribe to obtain their in any office, Civil, Military [or to obtain such office, or who the state.

inciples of government shall be sent of the people on summons to and the same day by an act of occasion: and if in such county unties shall give their suffrage for to them by the said act, the same and such repeal or alteration shall stand on the same footing with ed.

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ry History of Virginia," Virginia Magazine 1, pp. 43-47. According to Vol. 43 of at h's retirement from office, near the end of his

tion, to oppose a permanent constitution, until the people should elect deputies for the special purpose. He denied the power of the body elected (as he conceived them to be agents for the management of the war) to exceed some temporary regimen. The member alluded to, communicated the ideas of Mr. Jefferson to some of the leaders in the house, Edmund Pendleton, Patrick Henry, and George Mason. These gentlemen saw no distinction between the conceded power to declare independence, and its necessary consequence, the fencing of society by the institution of government. Nor were they sure, that to be backward in this act of sovereignty might not imply a distrust, whether the rule had been wrested from the king. The attempt to postpone the formation of a constitution, until a commission of greater latitude, and one more specific should be given by the people, was a task too hardy for an inexperienced young man.

A very large committee was nominated to prepare the proper instruments, and many projects of a bill of rights and constitution, discovered the ardor for political notice, rather than a ripeness in political wisdom. That proposed by George Mason swallowed up all the rest, by fixing the grounds and plan, which after great discussion and correction, were finally ratified.

The celebrated notes on Virginia have since become the vehicle of the former objections of its author made *in limine*.

"When the enemy shall be expelled from our bowels, when peace shall be established, and leisure given us for intrenching within good forms the rights for which we have bled, let no man be found indolent enough to decline a little more trouble for placing them beyond the reach of question, if anything more may be requisite to produce a conviction of the expediency of calling a convention at a proper season, to fix our form of government," etc. "The ordinary legislature may alter the constitution itself." There are indeed defects in it of magnitude; and there is no doubt, a power resident in the people to change it, as they please. If Mr. Jefferson's observations have contributed to some degree of restlessness under it, they ought if just to be adverted to. They have been disarmed of the possibility of mischief, by the solemn recognitions, in our courts of the validity of the constitution. It would be useless to revive a discussion, which has been thus put to sleep; though it may be yet asked, whether the confirmation of the people by their acquiescence for so many years, be no argument against the unhinging of such various authorities, which have been exercised under it, and possibly of some rights, which have been derived from it? Is it nothing, that independence was established, with as little premonition to the people, as the constitution was; and that the constitution, considered only as temporary, until a more legitimate one shall be adopted (which is the extent of his demand), can no more be revoked by the legislature, which is the creature of it, appointed to execute it, than the trustees of power can transcend their instructions? But happily, practical utility will always exterminate questions, too refined for public safety.

It has been often doubted too, whether a written constitution has any superiority over one unwritten. This is a point of comparison between the English constitution, and that of Virginia. An unwritten constitution can, upon the appearance of a defect, be amended, without agitating the people. A written one is a standing ark, to which first principles can be brought on to a test. Whatever merit is due to either opinion, it should not be forgotten, that the spirit of a people will in construction frequently bend words seemingly inflexible, and derange the organization of power. This has happened in Virginia, where the line of partition between the legislative and judicial department has been so remote from vulgar apprehension, or plausible necessity has driven such consideration before it.

The bill of rights and the constitution are monuments which deserve the attention of every republican, as containing some things which we may wish to be retrenched, and others, which cannot be too much admired.

The declaration in the first article in the bill of rights, that all men are by nature equally free and independent, was opposed by Robert Carter Nicholas, as being the forerunner of pretext or civil convulsion. It was answered, perhaps with too great an indifference to futurity, and not without inconsistency, that with arms in our hands, asserting the general rights of man, we ought not to be too nice and too much restricted in the delineation of them; but that slaves not being constituent members of our society could never pretend to any benefit from such a maxim.

The second article, derives all power from the people, and declares magistrates to be always amenable to them.

The third article affirms the supremacy of a majority in a community.

The fourth explodes an inheritance in office.

The fifth separates the legislative, executive and judicial functions, and reduces the members of the two former at fixed periods, to private stations.

One part of the sixth provides for the freedom of elections, and another confers the right of suffrage on all having sufficient evidence of a permanent common interest with, and of attachment to the community. But it did not intend to leave this right to the will of the legislature according to capricious views of expediency.

It reserved a more specific provision for the constitution. The seventh against the suspension of laws by any other authority than that of the representatives of the people was suggested by an arbitrary practice of the king of England before the revolution in 1688.

The eight reenacts in substance, modes for defence, for accused persons, similar to those under the English law.

The ninth against excessive bail and excessive fines, was also borrowed from England with additional reprobation of cruel and unusual punishments.

The tenth against general warrants was dictated by the remembrance of the seizure of Wilkes's paper under a warrant from a Secretary of State.

The eleventh preserving the trial by jury was not considered as a mandate to legislatures without the possibility of exception.

REVOLUTIONARY DECISIONS

The twelfth, securing the freeing militia to standing armies, historical experience.

The fourteenth prohibiting the of Virginia proceeded partly from boundaries of Virginia, were abridged more and Lord Fairfax, much to from recent commotions in the west.

The fifteenth, recommending fundamental principles, and the sixteenth were proposed by Mr. Henry. The supposed to be a dissenter, caused as a prelude to an attack on the constitution an object.

An article prohibiting bills of a terrifying picture of some towering laws would be impotent, saved proscribed.

In the formation of this bill of rights that the legislature should not in any other, that in all the revolutions of government, a perpetual standard should be maintained, might rally, and by a notorious record firm and virtuous.

The corner stone being thus laid power to different organs under control raised upon it.

James Madison

In 1775, he was elected a member of the time with his father (who was County proceedings belonging to the seen in the address to P. H. on the military stores in Williamsburg, rifled

He was restrained from entering the state of his health and the discouragement

*D. Adair, ed., "James Madison's Autobiography," Third Ser., Vol. 2, (1945), p. 199. According to date the Autobiography exactly. According probably written after August 1833.

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nd excessive fines, was also borrowed ion of cruel and unusual punishments. was dictated by the remembrance of arant from a Secretary of State, jury was not considered as a mandate exception.

The twelfth, securing the freedom of the press, and the thirteenth, preferring militia to standing armies were the fruits of genuine democracy and historical experience.

The fourteenth prohibiting the erection of a government within the limits of Virginia proceeded partly from local circumstances; when the charter boundaries of Virginia, were abridged by royal fiat in favor of Lord Baltimore and Lord Fairfax, much to the discontent of the people: and partly from recent commotions in the west.

The fifteenth, recommending an adherence and frequent recurrence to fundamental principles, and the sixteenth, unfettering the exercise of religion were proposed by Mr. Henry. The latter, coming from a gentleman, who was supposed to be a dissenter, caused an appeal to him, whether it was designed as a prelude to an attack on the established church, and he disclaimed such an object.

An article prohibiting bills of attainder was defeated by Henry, who with a terrifying picture of some towering public offender, against whom ordinary laws would be impotent, saved that dread power from being expressly proscribed.

In the formation of this bill of rights two objects were contemplated: one, that the legislature should not in their acts violate any of those canons; the other, that in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous. ★ BDR

The corner stone being thus laid, a constitution, delegating portions of power to different organs under certain modifications was of course to be raised upon it.

* * *

James Madison's Autobiography*

* * *

In 1775, he was elected a member of the Comee for the County, living at the time with his father (who was chairman of it) and had a part in the County proceedings belonging to the period. The spirit of the epoch may be seen in the address to P. H. on his expedition having for its object the military stores in Williamsburg, rifled by Gov. Dunmore.

He was restrained from entering into the military service by the unsettled state of his health and the discouraging feebleness of his constitution of

*D. Adair, ed., "James Madison's Autobiography," *William and Mary Quarterly*, Third Ser., Vol. 2, (1945), p. 199. According to *id.* at 193, it will probably never be possible to date the *Autobiography* exactly. According to Irving Brant, *ibid.*, the *Autobiography* was probably written after August 1833.

AMICUS

D 0378

DIRECT APPEAL

No. D-0378

**RECEIVED
IN SUPREME COURT
OF TEXAS**

NOV 21 1990

JOHN T. ADAMS, Clerk
By _____ Deputy

IN THE
SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

V.

WILLIAM N. KIRBY, ET AL.,

Appellees.

AMICUS MEMORANDUM BRIEF

Respectfully submitted,

Randall B. Wood
RAY, WOOD & FINE
P. O. Box 165001
Austin, Texas 78716

ATTORNEY FOR AMICUS
CURIAE EQUITY CENTER

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IN THE
SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

V.

WILLIAM N. KIRBY, ET AL.,

Appellees.

AMICUS MEMORANDUM BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW the Equity Center amicus curiae and files this its memorandum brief in this cause and would show unto this Court as follows:

I.

Status of Amicus

The Equity Center is an organization of Texas school districts that are below average wealth. The Center has 290 member school districts serving over 760,000 students, approximately one-third of all students in Texas. The Center provides research on all aspects of school finance with the goal of facilitating the adoption of an equitable school finance system for all of the students and taxpayers of Texas. While some of its member school districts are plaintiffs or plaintiff-intervenors in this cause, the Equity Center is not a party to this litigation.

II.

INTRODUCTION

The Equity Center was formed in 1982. Since that time it has provided the Legislature and the educational community with information relating to the equity, or the lack of it, in the Texas public school system. Most importantly, the Center has developed a school finance plan which would provide school districts across this state substantially equal access to revenues. The Equity Center plan is a reasonable, politically feasible approach which enjoys substantial support of many members of both the legislative and executive branches of this State.

The State of Texas advanced in the trial court that Senate Bill 1 should be upheld by the courts because the alternatives were politically unacceptable, barred by other constitutional provisions or simply undesirable. Judge McCown in his opinion, pp. 24-28, discusses these contentions.

After raising questions about most alternatives, the Court stated:

Beyond that, if an equalization plan without caps is the only solution, Senate Bill 1 is not an acceptable solution. *A much more equitable plan can be developed. For example, the Equity Center proposes a "floating cork" plan that provides substantially equal access.* Such a plan would 1) equalize to some point such as the 95th percentile of wealth for 95% of the students; 2) do so within a reasonable number of years; 3) include all state and local revenue; and 4) require biennium-to-biennium adjustments based upon where collective local decisions have placed the 95th percentile of wealth during the preceding biennium. (Emphasis added)

This is a clear finding by the trial court that reasonable, feasible alternatives exist that provide "substantial equal access to similar revenues per pupil at similar levels of tax effort." Edgewood v. Kirby, 777 S.W.2d 391, 397 (TEX. 1989). The Court's brief description of the Equity Center's plan is generally accurate except that the court apparently inadvertently used the term "wealth" where the plan actually calls for equal access to the amount at a selected percentile of state and local "revenues" for a selected percent of the students, an important distinction.

Because of the trial court's findings, the Equity Center felt that it might be helpful if this Court had available an analysis of pertinent elements of its plan.

III.

ESSENTIAL ELEMENTS OF THE EQUITY CENTER PLAN

The Six Key Questions

Here are the six key questions the Equity Center addressed in the development of its plan. They are listed in approximate order of their importance.

- HOW MUCH: What amount of revenue should students have equal access to?
- FOR HOW MANY: What percent of students should have equal access to that amount?
- AT WHAT TAX EFFORT: What should the local share of that amount of revenue be, expressed in terms of the equalized property tax rate required to raise that amount?
- AT WHAT COST TO THE STATE: Given appropriate answers to the first three questions, how much state aid is needed, and if that's too much, what are the options?
- HOW TO AVOID ENDLESS LITIGATION: What kind of fundamental change will stop the cyclical closing and reopening of the gap between rich and poor districts?
- HOW TO DEAL WITH REVENUE, STUDENTS, AND TAX CAPACITY OUTSIDE THE EQUALIZED SYSTEM: Should school districts or their tax bases be consolidated? Should expenditures or tax rates be capped?

Guidance from the Courts

If this Court had ruled in Edgewood that all students must have absolutely equal access to revenue, the state would have two choices:

- Provide the amount at the 100th percentile of revenue per student to 100 percent of students, or
- Provide a lower amount of revenue to 100 percent of students, and achieve equal access by consolidating school districts or tax bases, placing caps on expenditures, or funding all or most of public education with state taxes.

The first choice would mean raising over \$40,000 per student next year. That's almost eight times the national average. It would cost the state approximately \$184 billion per year, an increase of \$178 billion over the \$6 billion currently allocated.

The second choice would eliminate the excessive costs of the first, but most educators and state policymakers do not support the measures that the second choice would require.

In any event, this Court did not mandate absolute equality, but instead said that students must have substantially equal access to revenue. In other words, the students' school districts must have substantially equal access to similar amounts of revenue for similar tax effort.

In declaring that Senate Bill 1 failed to produce a constitutional system, the trial court cited the extraordinary cost of absolute equality and said that "No equalization plan can equalize to the 100th percentile of revenue for 100% of the students." The trial court also said that "An equalization plan at less than the 99th percentile [of revenue] for 99% of the students is not inherently inefficient. As long as the line drawn provides substantially equal opportunity, such a plan remains an option for the Legislature to consider."

On the question of consolidation, the trial court said that "While the evidence establishes that the state needs significant consolidation of districts both for financial and for educational reasons, there is little or no popular support for consolidation." On caps, the trial court concluded that "In the long run, all districts might be better off with less equalization without caps than more equalization with caps." In any event, the trial court said that an equalization plan without caps, with provisions like the Equity Center's, "provides substantially equal access."

The primary reasons the system before Senate Bill 1 did not work are the arbitrary and irrational exclusion of large amounts of revenue from the equalization process and the failure to acknowledge the real costs of education, including the cost of facilities. Senate Bill 1 will not work, according to the trial court, because it does not correct these flaws.

The Equity Center's Answers

The Equity Center has developed a set of principles and standards which it believes would provide a substantially equalized school finance system for Texas. These principles and standards were widely disseminated to officials in the executive and legislative branches as early as January of 1989 and throughout the sessions leading up to the passage of Senate Bill 1. The Center believes its plan is fully compatible with this Court's opinion and the trial court's subsequent ruling on Senate Bill 1. A summary of the Center's principles and standards, along with brief explanatory comments, follow:

- The amount of revenue which students have equal access to, i.e., the equal-access revenue level, should be set at an amount which ensures that only those districts whose revenues are clearly at high-end extreme levels, as determined by generally accepted statistical procedures, are excluded from the equalized system. Unlike Senate Bill 1, the objectives and procedures should be spelled out in specific and unambiguous statutory language.
- All but an insignificant number of students should be in districts which have fully equal access to the selected level of revenue, and only those districts whose wealth is clearly at high-end extreme levels, as determined by generally accepted statistical procedures, should be excluded from the equalized system. Again, unlike Senate Bill 1, the objectives and procedures should be spelled out in specific and unambiguous statutory language.
- All state aid and local tax revenues lawfully obtained and used for legal purposes, including facilities and equipment, should be included in the determination of the level of equal-access revenue. Those revenues should not be adjusted downward, as they would be under Senate Bill 1, on the basis of how they are spent or whether they are retained in fund balances, except to the extent, if any, that they have been spent or retained unlawfully. The Legislature need not lose control of revenue levels, since it has the option of making certain uses of revenue unlawful. (Questions would arise, of

course, as to the implications of making something unlawful after wealthy districts already had it in place.)

- Only state aid and local tax revenues should be included in the determination of the equal-access revenue level. They constitute the bulk of district revenues and the records are readily available and auditable. No bureaucratic analysis is needed. Other, non-tax revenues are relatively small, are not uniformly reported, and are not generally related to district wealth.
- Revenues used to determine the equal-access level must be measured and expressed in terms of total state aid and local tax revenue per weighted student, in order to neutralize the effects of cost differences among students and districts. Using revenues per unweighted student would discriminate against high-cost students and high-cost districts.
- The equal-access revenue level should be adjusted annually to reflect, in the trial court's words, "where collective local decisions [in the prior year] have placed" the amount to be selected by generally accepted statistical procedures, as discussed above. The equal-access level should also be adjusted annually, either prospectively or retroactively, for inflation and for the costs of changes in state mandates. Unlike the ad hoc language and highly subjective decision making process of Senate Bill 1, this automatic, mechanical, and objective process of updating the equal-access revenue level each year constitutes a profound and fundamental change in the state's school finance system. It would eliminate the cycles of a little progress followed by years of neglect. Decades of litigation would not be required.
- The Equity Center believes that the state could, if it would, fully implement the Equity Center's plan by school year 1992-93. In any event, the Center sees no rational basis for delaying full implementation of this or any other equalization plan beyond 1994-95.

Finally, and deserving special attention . . .

- The state should provide equalized funding of facilities and equipment by creating a full set of allotments, similar to existing program allotments, and including both new and old debt service. All identifiable costs and cost differences among students and districts should be determined and equalized in the same manner as other costs of education. All revenues used for facilities and equipment should be fully included in the determination of the equal-access level, as discussed above. The state's historic failure to provide direct support for facilities is a disgrace, and the continued absence of direct support under Senate Bill 1 is one of the most disequalizing aspects of the current school finance system. Instead of the indefinite delay in state support for facilities under Senate Bill 1, a temporary allotment, pending the adoption of an equalized allotment system, should be provided immediately to meet the critical needs of low wealth school districts.

NB: While the Equity Center was associated with a legislative compromise earlier this year that called for equal access to the 95th percentile of revenues for 95% of the students, the Center's own standards, enumerated above, would, when applied to current data, produce a higher revenue level for more students. The reason is that the true statistical extremes of both revenue and wealth do not appear until well above the 95th percentiles of revenue and wealth. Furthermore, the Equity Center believes that 5% of the students (150,000) outside the system is more than an insignificant number.

Mechanics and Mathematics of the Equity Center's Plan

The mechanics and mathematics of the Center's plan have been developed over a period of several years, with extensive consultation with state and nationally recognized school finance attorneys and technical experts. The details of the plan are not presented here but were presented to the trial court during the testimony of Craig Foster, executive director of the Center (SF 971-1307).

IV.

CONCLUSION

The above analysis of the Equity Center's plan is provided for whatever purposes may prove helpful to this Court in its historic considerations in this cause.

Respectfully submitted,

RAY, WOOD & FINE

By: 

Randall B. Wood
State Bar No. 21905000

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Austin, Texas 78716
512/328-8877

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Amicus Memorandum Brief has been filed in the Supreme Court of Texas and served by certified mail, return receipt requested, on all parties of record on this 21st day of November, 1990.


Randall B. Wood

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DIRECT APPEAL

DEC 10 1990

**AMICUS CURIAE BRIEF
EDGEWOOD VS. KIRBY**

JOHN T. ADAMS, Clerk

By ~~_____~~ To: ~~The~~ Honorable Supreme Court of Texas

**From: Paul G. Silber, Jr., Chairman
Special School Finance Committee
House of Representatives
62nd Legislature (1971 - 1972)**

Speaker Mutcher appointed Paul Silber Chairman of a Special House Committee on School Finance. The Committee was directed to investigate public school financing and recommend legislation to comply with Judge Adrian Spears decision in the Rodriguez Case. The committee held hearings, met to examine issues, discussed facts, outlined findings and formulated preliminary recommendations. The Committee never filed a report on instructions from Speaker-Elect Price Daniel, Jr.

The committee found the following:

1. The Legislature had not defined free public education.
2. The desire for local control of schools was universal.
3. Many school financed activities fell into non-essential enrichment categories that were nice if you could afford them.
4. The TEA was becoming or had become an unmanageable bureaucracy, which lacked flexibility and a commitment to efficiency and change.
5. Quality of education is much more the function of instruction than of facility.


Based on the above tenants, the Committee was preparing the following recommendations:

1. The Legislature should immediately define free public education.
2. Local districts should be responsible for facilities (expensive modern buildings, do not in themselves, provide better education, nor does inexpensive spartan facilities provide poorer education. This recommendation introduced an element of local control by permitting districts to provide facilities consistent with their community standards).
3. Local districts should be allowed to provide programs beyond that required under the definition of Free Public Education at the local districts sole expense. (This recommendation provided the local district a mechanism with which it could compete with private schools).

4. The cost of instruction should be the responsibility of the State. The State should provide teachers, pay teachers' salaries, and provide instructional materials. Local districts should not be permitted to supplement or improve the compensation package provided teachers by the State. (This recommendation would insure that the most important factors effecting education would be unquestionably equal. The poor districts would receive the same quality of instruction as the wealthy districts. Wealthy districts would not be able to attract the better teacher by offering more pay).
5. School administration should be provided by the local district. (The district would hire and pay the Superintendent and staff).

While the Committee did not address taxation or how its recommendations would be funded, it did recognize that the burden on the local districts should be reduced and the burden on the State should be increased. The committee was not thinking that local and state taxes both would increase. The need to restructure the TEA was an understood requirement.

Respectfully Submitted,


Paul G. Silber, Jr.
State Representative, District 57-6
62nd Legislature

D 0378

**RECEIVED
IN SUPREME COURT
OF TEXAS**

FEB 14 1991

NO. D-0378

JOHN T. ADAMS, Clerk

By _____ Deputy

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.

V.

WILLIAM N. KIRBY, ET AL.

ON MOTION FOR REHEARING

AMICUS CURIAE BRIEF

**By: The Honorable Robert Junell
State Representative
State Bar No. 11051500
P.O. Box 2910, Capitol Station
Austin, Texas 78711**

NO. D-0378
IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.

V.

WILLIAM N. KIRBY, ET AL.

ON MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

The author of this brief comes on his own behalf and on behalf of many listed members of the House of Representatives as a friend of the court in this case considering the constitutionality of the Texas system of financing public schools. These members of the legislature respectfully request the court, in considering the pending motion for rehearing, to additionally consider the following questions which they, as members of the legislature, find critical to enactment of legislation that meets the standards announced by the court against which an efficient system of public school finance is measured.

QUESTION ONE

In the court's opinion of January 22, 1991 ("Edgewood II"), the court stated, "nothing in Love [Love v. City of Dallas, 40 S.W.2d 20 (Tex. 1931)] prevents creation of school districts along

county or other lines for the purpose of collecting tax revenue and distributing it to other school districts within their boundaries."

The court's statement leaves unanswered the question:

Does the Texas Constitution prohibit the legislature from requiring, for purposes of achieving equalized funding, that taxes collected in one school district be redistributed to other school districts statewide? May the legislature constitutionally create a single statewide school district for the purpose of collecting tax revenue and distributing it?

QUESTION TWO

In the court's opinion in Edgewood II, the court stated, "To be efficient, a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate." Assuming that the legislature enacted a plan that meets the standard of drawing revenue from all property in the state at a substantially similar rate, the legislature is left with a remaining, related question:

Does the Texas Constitution permit local enrichment through locally adopted ad valorem taxes that is unequalized, i.e., may the legislature enact a plan that permits a school district to levy and collect a local enrichment tax above and beyond any taxes for which the state provides a guaranteed yield?